Supreme Court, U.S.
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No. 01_____

IN THE
SUPREME COURT OF THE UNITED STATES

Kismet Investors, Inc., a
Minnesota corporation,

Petitioner,

vs.

County of Benton,

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a governmental agency's judgment concerning adverse secondary effects caused by sexually oriented businesses, when based upon data that is unreliable and outdated, forever immune from constitutional scrutiny, regardless of whatever contrary substantive evidence may arise?

2. Did the court properly grant summary judgment on the issue of whether the remedy chosen to regulate adverse secondary effects was itself narrowly tailored so as to prevent such adverse secondary effects, in light of unrefuted evidence that the remedy, if implemented, not only would not ameliorate secondary effects but would exacerbate them?

3. Can an ordinance regulating sexually explicit entertainment comply with the requirement that it make available alternative avenues of communication when the undisputed evidence indicates that all locations were available only at the discretion of the County Planning Commission?

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CORPORATE DISCLOSURE STATEMENT

Petitioner in the above-entitled matter is Kismet Investors, Inc. , a Minnesota corporation. There is no parent or publicly held company owning more than 10% of the corporation's stock.

All parties to the proceeding are listed in the caption.

OPINIONS BELOW

Kismet Investors, Inc., respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Minnesota, issued November 15, 2000, Appendix at A.1, denying Petitioner's petition for a review of the decision of the Minnesota Court of Appeals, issued September 12, 2000.

The order of the Minnesota Supreme Court is unpublished. The decision of the Minnesota Court of Appeals, which the Minnesota Supreme Court refused to review, is reported at 617 N.W. 2d 85 (Minn. App. 2000). The opinion is set forth in the A.appendix at A.2-A.24. The Minnesota Court of Appeals' opinion affirmed two decisions of the State District Court, Seventh Judicial District, the first, entered July 7, 1999, granting partial summary judgment to Respondent, and the second, entered December 22, 1999, dismissing Petitioner's complaint after a trial. Both District Court opinions are

unpublished and are set forth in the appendix at A.25-A.75.

JURISDICTION

The Minnesota Supreme Court issued its order on November 15, 2000, denying a timely petition for further review of a decision of the Minnesota Court of Appeals. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 1.

The First Amendment to the United States provides, in pertinent part: "Congress shall make no law...abridging the freedom of speech or of the press..."

Constitution of the United States, Amendment 14.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "...nor shall any State deprive any person life, liberty, or property without due process of law..."

Title 42 U.S.C. Sec. 1983.

Title 42 U.S.C. Sec. 1983 provides, in pertinent part: "Every person who, under color of state laws...subjects or causes to be subjected, any citizen to the deprivation of any

rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law."

Because of its voluminous nature, the Benton County Adult Use Ordinance is set forth in the appendix at A.87-A.96.

STATEMENT OF THE CASE

Since January 2, 1997, Petitioner Kismet Investors, Inc., a Minnesota corporation, has operated a business known at "King's on the Lake" in unincorporated Benton County.[1] The business features live non-obscene nude dance entertainment.

The business itself has operated since September of 1993. When King's first opened for business, Respondent Benton County sought its closure pursuant to the conditional use permit requirement in its Development Code, only to be enjoined, both temporarily and permanently by the United States District Court by the District of Minnesota. See *Bukaka, Inc. v. County of Benton,* 852 F. Supp. 807 (D. Minn. 1993), and *Mga Susu, Inc. v. County of Benton,* 853 F. Supp. 1147 (D. Minn. 1994).

The following year, the county enacted Ordinance No. 242, a copy of which is set forth in the appendix at A.87-A.96, zoning so-called "adult uses." Section 7.10.2 of the ordinance required adult uses to be located in the areas zoned B, B-2, I-1

1See complaint, paragraphs 3 and 4, Appendix A.3-A.4.

and I-2 provided they are not located within 500 feet of residentially zoned property, a school, church, day care facility, hotel or motel, or public park. Appendix at A.94-A.95.

Petitioner's use was in an area zoned B, in which adult uses were permitted, but was located within 500 feet of residentially zoned property. Id at A.32.

Ordinarily, uses which were legal at the time the zoning code was enacted or amended are permitted to remain permanently as non-conforming uses.[2] However, under Sec. 7.10.3 of Ordinance No. 242, all non-conforming adult uses were required to cease operation as of July 31, 1998.[3]

After the decisions of the United States District Court rendering the King's Inn a lawful use in Benton County, and prior to the enactment of the restrictive zoning ordinances, Petitioner's predecessor in title made substantial improvements to the premises on which King's Inn was located, essentially rendering the premises useless for any purposes other than an adult entertainment establishment. These improvements include a custom-built roof, which eliminated the ventilation system necessary

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2See Benton County Zoning Ordinance 4.2.1, Appendix at A.97-A.99..

3See Id. at A.95.

to allow the building to continue its previous use as a restaurant; a custom-built stage costing at least $63,000, situated immediately below the custom-built roof, useful for no other purpose other than adult entertainment; within the roof, a dome containing custom-made lighting, speakers, and sound system, focused directly on the stage, costing in excess of $80,000; a security and monitoring system focused on the stage and surrounding audience area, costing in the neighborhood of $43,000; a D.J. booth and wiring system into the sounds amplification system in the roof area, costing in excess of $50,000 (Appendix at A.263-A.279).

In reliance upon the extreme hardship which compliance with the amortization provision ordinance would entail, Petitioner on July 22, 1998, filed with the Benton County Board of Adjustments an application for a variance from the 500-foot setback requirement from residentially zoned property. In support of the variance application, Petitioner presented not only the uncontradicted evidence of the extreme hardship that enforcement of the amortization provision would cause for the subject property, but also the uncontradicted report of Planning Consultant R. Bruce McLaughlin, indicating that in its five years of operation, the King's Inn had caused virtually none of the adverse secondary effects which this Court has held to constitutionally justify zoning restrictions on adult

entertainment.[4] For example, the McLaughlin report pointed out that in its five years of existence, property values around King's Inn increased at double the rate of unincorporated Benton County as a whole, and more than four times as fast as a comparable control use, Pirate's Cove, located on the same highway, not featuring adult entertainment (Appendix at A.232-A.242). With respect to crime in the surrounding area, the McLaughlin report pointed out that in its years of existence, King's on the basis of area and seating capacity, generated fewer police calls than Rumor's Bar, an alcohol establishment nearby, and absolutely fewer police calls than a local gas station and convenience store. The report indicated absolutely no sex offenses or drug crimes at King's. Id. at A.225-A.231.[5] Despite the overwhelming evidence in support of the petition, the Benton County Board of Adjustments denied the variance application of October 15, 1998. See appendix at A.84-A.86.

On October 23, 1998, Petitioner commenced the present action in Benton County District Court, seeking judicial review

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4See for example, *Young v. American Mini-Theaters*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

5McLaughlin's statistical analysis of secondary effects of King's is uncontradicted on this record.

of the variance denial, and challenging the constitutional validity, under the First and Fourteenth Amendments to the United States Constitution, of Ordinance No. 242.[6] Contemporaneously with the summons and complaint, Petitioner filed a motion seeking temporary injunctive relief.

In support of the motion for temporary injunction, Petitioner tendered the affidavit of Richard Wilson, Appendix at A.120-A.127, stating, inter alia, that virtually all of the studies that found in particular that nude dance establishments caused adverse secondary effects date back to the 1970's or early 1980's. He points out that during this period of time the nude dance club industry was vastly different than it is now. He points out that during this period of time, nude dance establishments consisted basically of rather sleazy topless bars, poorly maintained and poorly operated, at which most people would not wish to be seen. He points out that over the past 15 years, the industry had dramatically changed and that the sleazy strip bar is gradually going out of existence, to be replaced by what he calls an upscale adult cabaret. He points out that such establishments generally emphasize hospitality and safety of customers. They are

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6The complaint is set forth in the Appendix A100-A119. Since the denial of the variance is exclusively a matter of state law, Petitioner does not seek review of the validity of the denial of the variance. Rather, review is limited to the constitutionality, under the First and Fourteenth Amendments, of Ordinance No. 242, both facially and as applied.

characterized by expensive buildings, with substantial investments in high technology equipment such as lighting, sound, and security. . The Wilson affidavit points out that far from causing property values to decline and crime to increase, the upscale adult cabaret generally enhances property values in the surrounding community and contributes to public safety. He points out that the "adverse secondary effects" such as a decline in property value and an increase in crime are as abhorrent to an upscale adult cabaret operated as they would be to any other business, because they would scare away the very clientele the upscale cabaret is seeking.

The Wilson affidavit further points out that, based upon on personal observation and upon the nature of the equipment and improvements made to the King's Inn, King's is far more like the upscale adult cabaret then it is a sleazy strip bar (Id. at A.488).

On July 7, 1999, the District Court, by Judge Hoolihan, issued findings of fact, conclusions of law, and an order granting partial summary judgment,[7] upholding the constitutional validity of ordinance No. 242, insofar as the factual predicate for its enactment was concerned. The order set for trial the issue of whether the ordinance allowed for adequate alternative avenues of communication.

7A copy of the order is set forth in the Appendix at A.48-A75..

A file on those issues was held before Judge Hoolihan, sitting without a jury, on November 12, 1999. At that trial, Ron Peterson, director of the Benton County Department of Development, testified that given the area in which adult uses are permitted, and given the setback requirements from residential areas, churches, schools, daycare centers and parks, some 101 sites were available within unincorporated Benton County for adult entertainment uses (T.22). However, on cross-examination, Peterson conceded that anytime a land owner would convert from one land use to another, Peterson's office would want to review that use for compliance with zoning laws, especially if a commercial use, such as a restaurant, were to convert to an adult entertainment use (T.51). On cross-examination, Peterson conceded that at least part of the review that would be triggered was compliance with the county's off-street parking requirements.[8] The off-street parking requirements, set forth in the Development Code, introduced as Exhibit 2 at trial provides, in Sec. 9.2.1, Subparagraph C, "Required off-street parking spaces shall be provided as determined by the County Planning Commission." T.45.

Consequently, Peterson conceded that, to the extent that the Planning Commission has the absolute authority to set off-street

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8On two separate occasions, Peterson admitted that unless the proposed use complied with off-street parking requirements, the use would not be permitted. See T.44.

parking spaces in its discretion, and prevent the establishment of any use which does not meet those requirements, all 101 locations are available to adult businesses, only in the discretion of the Planning Commission. (T.47).

On this basis, Appellant's expert, Florida planner Robert Bruce McLaughlin , disqualified all available sites, testifying as follows:

> "There is absolutely nothing anywhere in the code that prohibits the Planning Commission from saying if you've got a 100 acre site, you need 100 acres and 350 square feet for parking. If you've got 200 acres, you need 200 acres plus 350 square feet for parking. If you've got 640 acres, you need 640 acres plus 350 feet of parking. There is nothing in the code anywhere to prevent them from doing that." T.98.

In its opinion, the District Court held that the Benton County ordinance provided adequate sites for location of adult businesses, notwithstanding the fact that all of those sites were available only at the County Planning Commission's discretion. Appellant's Appendix at A.33-A.35.

On September 12, 2000, the District Court's decision was affirmed by the Minnesota Court of Appeals, (Appendix at A.2-A.24, *Kismet Investors, Inc. v. County of Benton,* 617 N.W. 2d 85 (Minn. App. 2000).

On November 15, 2000, the Minnesota Supreme Court denied Petitioner's petition for further review.

REASON FOR GRANTING THE WRIT

I. A SUBSTANTIAL CONSTITUTIONAL QUESTION EXISTS AS TO WHETHER THE MINNESOTA COURTS ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON THE ISSUE OF WHETHER ITS ZONING ORDINANCE WAS "NARROWLY TAILORED" TO THOSE USES FOUND TO CAUSE ADVERSE SECONDARY EFFECTS, IN LIGHT OF SUBSTANTIAL AND LARGELY UNCONTRADICTED EVIDENCE THAT NO SUCH EFFECTS WERE CAUSED BY PETITIONER'S USE.

A. PETITIONER'S USE IS PRESUMPTIVELY ENTITLED TO PROTECTION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has clearly and repeatedly held nude dancing to be an activity presumptively entitled to protection under the Free Speech Clause of the First Amendment to the United States Constitution. See for example, *California v. LaRue*, 409 U.S. 109 (1972); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); and *Schad v. Borough of Mt.Ephraim*, 452 U.S. 61 (1981). In *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991), 8 of the 9 Justices of this Court reaffirmed the entitlement of

nude dancing to First Amendment protection as did a majority of this Court in the more recent decision of *City of Erie v. Pap's A.M.*, 529 U.S.___, 120 S.Ct. 1382 (2000).

B. GIVEN THE SUBSTANTIAL EVIDENTIARY SHOWING THAT PETITIONER'S USE CAUSED NO ADVERSE SECONDARY EFFECTS, THE DECISION TO GRANT SUMMARY JUDGMENT TO UPHOLD THE VALIDITY OF THIS ORDINANCE IS IN CLEAR VIOLATION OF APPLICABLE DECISIONS OF THIS COURT AND OF COURTS OF APPEALS AND AT LEAST ONE OTHER UNITED STATES COURT OF APPEALS.

When this Court in *Young v. American Mini Theaters*, 427 U.S. 50 and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), upheld the constitutional validity of separate zoning treatments for adults only theaters, based upon the contents of the film shown, it departed from its long-standing tradition of permitting content-based discrimination of speech only in the most limited of circumstances. Compare, for example, *Police Department of Chicago v. Mosley*, 409 U.S. 92 (1972); *Regen v. Time, Inc.*, 468 U.S. 641 (1984); and *Texas v. Johnson*, 491 U.S. 397 (1989). The basis for this Court's departure from its long standing prohibition against content-based discrimination was the theory that the ordinances were justified, not by objection of the content of protected speech,

but by the adverse secondary effects caused by such speech, such as a decline in the value of surrounding property, and an increase in the crime in the surrounding neighborhoods.[9]

As a result of the "secondary effects rationale of *Young* and *Renton*, a necessary corollary has arisen: Regulation of adult entertainment, in order to be constitutionally valid, must be "narrowly tailored" to those uses shown to have caused secondary effects. In *Young*, Justice Powell, whose concurring opinion provided the fifth vote necessary to uphold the validity of the Detroit ordinance in question, stated, "The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding neighborhoods." 427 U,S. at 82 (Powell, J. concurring). Likewise, in *Renton*, the ordinance was upheld only because it was ""narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects..." 475 U.S. at 52.

Relying upon these two comments, numerous courts have invalidated zoning restrictions on adult entertainment, even nominally patterned after *Young* and *Renton*, when a particular type of adult use has not been shown to cause adverse secondary effects. See, for example, *Pringle v. City of Covina*, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981); *Tollis, Inc. v. San Bernardino County*, 827 F. 2d

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9See for example, the plurality opinion of Justice Stevens in *Young*, 427 U.S. at 71, n. 34.

1329 (9th Cir. 1987); *World Wide Video v. City of Tukwila*, 117 Wash. 2d 382, 816 P. 2d 18 (1991), cert. denied, __ U.S.___, 112 S.Ct. 1672, 118 L.Ed. 2d 391 (1992); *Janra Enterprises, Inc. v. City of Reno*, 818 F. Supp. 1361 (D. Nev. 1993); and *Sebago, Inc. v. City of Alameda*, 211 Cal. App. 3d 1372, 259 Cal. Rptr. 918 (1989), rev. denied, (Cal. 1989).

Judged by these standards, at minimum, a factual dispute existed as to whether the county's ordinance in question was narrowly tailored to those uses found to cause adverse secondary effects. As already noted, supra, the affidavit of Richard Wilson indicated that all of the studies from the 1970s and 1980s, which were the studies relied upon by the County of Benton in enacting the ordinance,[10] were premised on a type of facility which, by and large, no longer exist, the old sleazy type of "strip bar," characterized by poor maintenance, lack of concern for customer safety, lack of cleanliness, poor lighting and upkeep, and generally a "low life" type of clientele. By contrast, the upscale cabaret, in which catagory Wilson places the King's Inn, a clear, well maintained, with an emphasis on hospitality and security. No evidence exists that such establishments had ever caused adverse secondary effects. This opinion evidence was reinforced by the emperical data in

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10Reliance upon these studies is set forth on the face of the ordinance. See Appendix at A.87.

the McLaughlin Plan Review, indicating that, in fact, during its four years of of existences, King's has caused no adverse secondary effects.

In holding that no genuine issue of material fact existed as to whether the Benton County ordinance was sufficiently tailored to pass First Amendment consideration, the Minnesota Court of Appeals said it was "necessarily" limited to "the information available to the county when it passed the ordinance," and the it would not "second guess the scientific accuracy of a legislative determination of fact." Appendix at. A.18-A.19, 617 N.W. at 94. The court further found that because the county relied upon studies of adult uses addressing similar businesses, it may regulate adult businesses as a class, without regard to whether a particular genre of adult businesses causes adverse secondary effects. Id.

Thus, the position of the Minnesota Court of Appeals appears to be that if a government agency, in enacting a nominally content-based restriction on speech, relies upon some evidence, no matter how outdated and unreliable that evidence may be, that secondary effects are caused by some type of adult entertainment, that judgment is forever immunized from constitutional scrutiny.

This position is plainly at odds with decades worth of

decisions of this Court and other courts of appeals.

See for example, this Court's decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), in which this Court stated:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice...the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." 304 U.S. at 153, 58 S.Ct. at 784."

The Third Circuit clearly applied this principle in a First Amendment context in *New Jersey Citizen Action v. Edison Township*, 797 F. 2d 1250 (3rd Cir. 1986), in which it invalidated a municipal ordinance proscribing door-to-door, political canvassing and solicitation after 5:00 p.m., only two years after a panel of the same court had upheld the validity of identical restrictions in *Pennsylvania Alliance for Jobs & Energy v.Council of the Borough of Munhall, (PAJE)*, 743 F. 2d 182 (3rd Cir. 1984). The reason for the rapid reversal of its decision was the fact that in *PAJE*, the municipal government had justified the restrictions on the need to prevent residential burglaries, while in *New Jersey Citizen Action*, the Plaintiffs empirically demonstrated that the restrictions were unnecessary

to accomplish such an end.

Applying the same principle, it is clear that if Petitioners can demonstrate that the "secondary effects" rationale of studies 20 and 30 years old is no longer applicable, a restriction premised on those studies cannot pass constitutional muster under *Renton*.

The fact that the county's decision, based upon outdated and unreliable information, is not immune from constitutional scrutiny was reaffirmed by this Court's decision in *City of Erie v. Pap's A.M.*, supra, 529 U.S.___, 120 S.Ct. 1382 (2000). In that case, a four-Justice plurality, written by Justice O'Connor, upheld the validity of the city's public nudity ordinance, on a secondary effects rationale, but only because the rationale was not contested by the adult entertainment establishment which challenged the validity of the prohibition. Justice O'Connor wrote, in part IV of her opinion:

> "Here, Kandyland has had ample opportunity to contest the Council's findings about secondary effects - before the Council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the City Council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the Council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited (emphasis

supplied)." 120 S. Ct. at 1396.[11]

Justice O'Connor proceeded to reject Justice Souter's concurring opinion, which would have demanded a much stronger evidentiary basis for the Council's conclusion with respect to adverse secondary effects, stating the following:

> "Justice Souter next hypothesizes that the reason we cannot accept Erie's conclusion is that, since the question whether these secondary effects occur is 'amenable to empirical treatment,' we should ignore Erie's actual experience and instead require such an empirical analysis. [Citation omitted.] In *Nixon* [v. *Shrink Missouri Government PAC*, 528 U.S. ___, 120 S. Ct. 897 (January 24, 2000)], however, we flatly rejected that idea. [Citation omitted.] (Noting that the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government)." Id. at 1397.

The reference to the *Nixon* case was to in the Court's decision upholding the validity of the Missouri legislature's limitation on the amount of contributions to candidates for state office. At issue was whether a sufficient evidentiary basis existed to support the purported need for such a restriction, based upon the justifications of prevention

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11The so-called "expert judgment" consisted of the City Council members' "first-hand knowledge of what took place at and around nude dancing establishments in Erie," enabling such members to make "particularized expert judgments about the resulting harmful secondary effects." Id. at 1397.

of corruption and government and public perception of corruption in government. The Court then proceeded to outline the evidentiary record made in the trial court to support the conclusion that both interests would be furthered by the legislation in question. The Court, by Justice Souter then concluded as follows:

> "There might, of course, be need for a more extensive evidentiary documentation if Petitioner's had made any showing on their own to case doubt on the apparent implication of *Buckley's* and the record here (emphasis supplied), but the closest Respondents come to challenging these conclusions is their invocation of academic studies said to indicate that large contributions to public officials or candidates do not actual result in changes in the candidates' position. Brief for Respondent's Shrink Missouri Government PAC, et al 41; Smith, Money Talks; Speech, Corruption, Equality and Campaign Finance, 86 Geo. L.J. 45, 58 (1997); Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 Yale L. J. 1049, 1067-1068 (1995). Other studies, however, point the other way. Reply Brief for Respondent Bray 4-5; F. Sorauf, Inside Campaign Finance 169 (1992); Hall & Wayman, Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees, 84 a.m. Pol. Sci. Rev. 797 (1990); D. Magleby & C. Nelson, The Money Chase 78 (1990). Given the conflict among these publications, and the absence of any reason to think that public perception has been influenced by the studies cited by Respondents, there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of corresponding suspicion

among voters." Id. 120 S. Ct. at 908..

Thus, it is clear from both the O'Connor concurrence in *Pap's* and the majority opinion in *Nixon*, written by Justice Souter, that this Court has adopted the following standards with respect to evidentiary burdens to justify restrictions on First Amendments rights:

1. Automatic deference to governmental conclusions occurs only when those conclusions are not challenged by the proponents of First Amendment rights.

2. Where such a challenge occurs, and the evidence is contradictory, or does not necessarily dispute the government's conclusion deference will occur in those cases as well.

3. Where there is a conflict between the city's own experience and academic studies, the city's own experience prevails.

4. Apart from the foregoing situations, objective truth plainly does make a difference.

Judged by these standards, the inadequacy of the error of granting summary judgment to Respondent is obvious. Clearly, the county's conclusions as to secondary effects were in fact challenged directly at all stages of the proceeding. Moreover, to the extent the county's own "experience" was at issue, it directly contradicted the studies upon which it relied. The county's own experience was that, far from causing property values to decline, the presence of Petitioner's establishments has resulted in property values sharply increasing. Far from causing a particular problem for law

enforcement services, Petitioner's establishment causes relatively fewer law enforcement problems than do comparable establishments no featuring adult entertainment. Thus, to the extent this Court now mandates deference to a municipality's own experience" over academic studies, at minimum, a genuine issue of material fact has been created.

Finally, the standard adopted by the Minnesota Court of Appeals plainly contradicts the rationale of a virtually contemporaneous decision from the United States Court of Appeals for the Ninth Circuit in *Alameda Books, Inc. v. City of Los Angeles*, 222 F. 3d 719 (9th Cir. 2000), in which that court invalidated a municipal ordinance prohibiting multiple adult uses within a single building, finding that the study relied upon by the city did not support the ordinance in question. Referring to its earlier decision in *Tollis v. San Bernardino County*, 827 F. 2d 1329 (9th Cir. 1987), the Ninth Circuit in *Alameda Books* stated the following:

> "[W]e held that under *Renton*, the county 'must show that in enacting the partial limitations...it relied upon evidence permitting a reasonable inference that, absent of such limitations, the adult theaters would have harmful secondary effects.' [Citation omitted.] We then found that the county had presented no evidence that a single showing of an adult film would have any of the harmful secondary effects on the

> community that the county identified as the basis for the regulation. [Citation omitted.]
>
> Like the county in *Tollis*, Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful effects identified in the Study...Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects."Id. at 725.

By this standard, the impropriety of summary judgment on behalf of the county in the instant case is obvious. Given the substantial and uncontradicted evidence that uses of the genre of adult business engaged in by Petitioner cause no adverse secondary effects, when coupled with a total absence of evidence of adverse secondary effects plainly indicate it is unreasonable for the county to believe that absent its present regulations harmful secondary effects would occur.[12] Indeed,

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12In this regard, it should be noted that the factual posture of the instant case is far different from the factual posture in *Renton*. In *Renton*, the city was enacting adult zoning regulations, prior to any adult business opening within the city. See 475 U.S. at 52-53. It is therefore eminently reasonable, in evaluating the factual predicate for such an ordinance, to look merely at the legislative record before the enacting body, at the time of enactment. By contrast, what is at issue in the instant case is not the enactment of a new

it should be noted that the Minnesota Court of Appeals itself implicitly acknowledged that the ordinance would not have passed constitutional muster under the standard adopted by the Ninth Circuit in *Alameda Books*. The Minnesota Court of Appeals stated:

> "Kismet asserts that a recent Ninth Circuit opinion requires a more exacting analysis to determine whether a local government reasonably relied on an adult-use study. See *Alameda Books, Inc. v. City of Los Angeles*, 222 F. 3d 719, 724 (9th Cir. 2000)...we conclude, however, that *Mitchell v.[Commission on Adult Entertainment Establishments*, 10 F. 3d 123 (3rd Cir. 1993), and *ILQ [Investments v. City of Rochester*, 25 F. 3d 1413 (8th Cir. 1994)] demonstrate a better application of *Renton's* holding that a local government may rely on studies from other localities if the studies are 'reasonably relevant to the problem that the [locality] addresses.' [Citation omitted.]"
> 617 N.W. at 94, Appendix at A.20.

Plainly, resolution of the clear conflict between the

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ordinance in a jurisdiction which had no adult businesses; rather, it is the amortization of an existing adults-only business, which developed a four-year track record of not causing adverse secondary effects. Compare *XLP Corp. v. County of Lake*, ___N.E. 2d___, 2000 W.L. 33156447 (Ill. App. 2d Dist. 2000).

Ninth Circuit on the one hand, and the Minnesota Supreme Court, and the Third and Eighth Circuits on the other hand, is itself a basis for granting the writ of certiorari.[13]

II. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER THE ORDINANCE, IF IMPLEMENTED, WOULD HAVE THE EFFECT OF AMELIORATING ADVERSE SECONDARY EFFECTS.

Even assuming that the county, at the time it enacted the ordinance in question, had before it legally sufficient evidence to support the proposition that Petitioner's uses cause adverse secondary effects, there is clearly, in light of this Court's decision in *City of Erie v. Pap's A.M.*, 529 U.S.___ (2000), in order for even a content-neutral regulation of speech to be valid, it must in fact advance the content-neutral goal of

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13In this regard, it should be noted that the Ninth Circuit in *Alameda Books* expressly rejected the Third Circuit's standard in *Mitchell*, stating, "merely requiring that a legislative body show that adult establishments as a class cause adverse secondary effects the regulation is aimed at preventing could easily fall short of our requirement in *Tollis* that a legislative body 'must show that in enacting the particular limitations...it relied upon evidence permitting the reasonable inference that, absent of such limitations, the adult [businesses] would have harmful secondary effects' [Citation omitted.] 222 F. 3d at 727.

eliminating adverse secondary effects.[14] In this regard, Petitioner submitted essentially uncontradicted evidence that where amortization of non-conforming adult uses has taken place, it has resulted, not in amelioration of adverse secondary effects, but in their exacerbation. The report points out that in the case of "*Ray's Playpen*" a Kansas City adult bookstore which, as a lawful nonconforming use, was acquired as part of an eminent domain proceeding, along with two other legal nonconforming uses, resulted in a decline in property values and a loss of tax revenue for the City of Kansas, Missouri (Appendix at A.187-A.189). He pointed out that in Pinellas County, Florida, an adult cabaret operated from 1988 to 1994, during which time property values in the area of the cabaret increased substantially. When closed by amortization in 1995, property values in the area of the cabaret fell precipitously (Id. at A.188-A.191).

Likewise, in the amortization made famous in *Town of Islip v. Cavigilia,* 73 N.Y. 544, 540 N..E. 2d 215 (1989), the following resulted:

"Eight years later in 1997, the building deteriorated

14To be sure, at least according to the plurality opinion in *Pap's*, this is a minimal burden, but a burden nonetheless. See Id. at 1397.

> to the point where there is a clear and present danger to persons on the property. The building is open to the elements, it has been vandalized, there is clear evidence of sexual activity and drug use on the property, and the property is being used for illegal dumping. The residential use to the north, which is was of an alleged concern to the Town at the time of the Study is also vacant, and several commercial uses across the street have closed. There can be no doubt that closure of "Gloria's Place" has not only dramatically and adversely affected property values in the area, but it is also brought true blight to the area." Id. at A.674-A.675..

Indeed, on the record presented in the instant case, absolutely no basis exists for suggesting the result would be any different if Petitioner's use were amortized. An existing prosperous land use, resulting in no significant law enforcement problems and a substantial increase in the value of surrounding property would be replaced by a vacant building absolutely unusable for the only purpose for which it was designed. How such a result would continue the property value increase caused by existing land use is unexplained by either Respondent or the District Court or the Court of Appeals.[15]

15This problem cannot be waved away by simple reliance upon the language in *Young* that city's must be "free to experiment" in order to resolve complex urban problems. 427 U.S. at 71. The problem with this language is that now, 24 years after *Young*, amortizing of non-conforming adult

III. THE ORDINANCE WOULD HAVE THE EFFECT OF SUPPRESSING OR GREATLY LIMITING ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Young*, this Court upheld the validity of Detroit's adult entertainment zoning ordinance, only upon a factual showing that implementation of the ordinance would not limit the availability of adult entertainment to the residents of the City of Detroit. Writing for the plurality, Justice Stevens noted that, under the ordinance, "The market for this commodity is essentially unrestrained." 427 U.S. at 62. He further wrote that the "situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to, lawful speech." Id. at 71, n. 35.

The record in the instant case was essentially undisputed

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uses is no longer an "experiment." It is something municipalities throughout the country have repeatedly engaged in. Its track record of advancing content-neutral goals is now plainly before the Petitioner and must be considered in determine the constitutional validity of the ordinance. Plainly, at least a genuine issue of material fact on the issue was created; given the uncontradicted nature of McLaughlin's evidence, summary judgment, if granted at all, should have been granted to Petitioner.

that, while the city asserted that over 100 sites were available for adult entertainment, within unincorporated Benton county, under the terms of the ordinance, these sites were available only in the unbridled discretion of the county's planning commission, since, as noted, supra, a new business could not be established in Benton County, without complying with the county's off-street parking requirements. The ordinance governing off-street parking gave to the county's Planning Commission absolute unbridled discretion, on a business-buy-business, to set the off-street parking requirement at any figure it wishes.

To permit the city to meet the alternative avenues of communication requirements of *Young* and *Renton* with locations available only at the discretion of the city plainly is contrary to a long line of decisions of this Court holding that the mere existence of discretion renders a regulation of speech unconstitutional. See for example, *City of Lakewood v.Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), and *Forsyth County,Ga v. Nationalist Movement*, 505 U.S. 123 (1992).

In this regard, the Minnesota Court of Appeals decision is directly contrary to the Eleventh Circuit's decision in *Lady J Lingerie v. City of Jacksonville*, 176 F. 3d 1358 (11th Cir. 1999), holding that the city could not comply with a *Young-Renton* alternative avenues requirements with locations

available only at governmental discretion. In this regard, see also *University Books and Videos, Inc. v. Metropolitan Dade County*, 33 F. Supp. 2d 1364 (S.D. Fla. 1999), and the *University Books and Videos, Inc. v. Metropolitan Dade County*, ___F. Supp. 2d___(S.D.Fla January 25, 2001).[16]

Since the Court of Appeals decision directly contradicts decisions of both this Court and the Eleventh Circuit, certiorari should be granted.

CONCLUSION

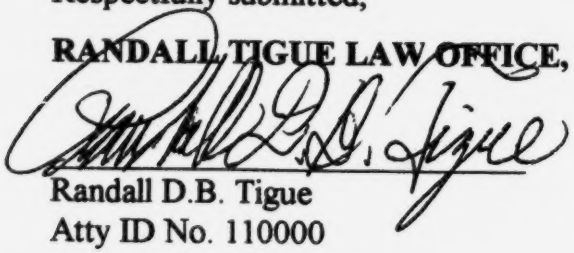
For all of the foregoing reasons, Petitioner's writ of

15In its opinion, the Minnesota Court of Appeals attempts to distinguish *Lady J Lingerie* by asserting that the parking requirements "do not give county officials discretion to deny Kismet's ability to operate an adult use in Benton County..." 617 N.W. 2d at 95, Appendix at A.22. The assertion is directly contrary to Benton County's own testimony in the record in which the Planning Director clearly admitted that unless the off street parking requirements were complied with, a use would not be permitted. See T. 44.

certiorari should be, in all respects, granted.

Respectfully submitted,

RANDALL TIGUE LAW OFFICE, P.A.



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A.1

STATE OF MINNESOTA
IN SUPREME COURT

C9-00-65

Kismet Investors, Inc.

Petitioner,

vs.

County of Benton,

Respondent.

ORDER

Based upon all the files, records and proceedings herein:

IT IS HEREBY ORDERED: that the petition of County of Benton for further review be, and the same is, denied.

November 15, 2000

BY THE COURT:

/s/
Alan C. Page
Associate Justice

BLATZ, C.J., took no part in the consideration or decision of this case.

A 2

STATE OF MINNESOTA
IN COURT OF APPEALS
C9-00-65

Kismet Investors, Inc.,
Appellant,

VS.

County of Benton,
Respondent.

Filed September 12, 2000
Affirmed
Lansing, Judge

Benton County District Court
File No. C0981240

Randall D.B. Tigue, Randall Tigue Law Office, P.A., 2940 Pillsbury Avenue South, Suite 200, Minneapolis, MN 55408 (for appellant)

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Considered and decided by Lansing, Presiding Judge, Klaphake, Judge, and Peterson, Judge.

A 2

A-3

SYLLABUS

I. Use variances, when permitted under Minnesota statutes, must be justified by showing that a landowner will suffer particular hardship absent the variance. Practical difficulties alone cannot justify a use variance.

II. Although statutes and ordinances generally carry a presumption of Constitutional validity, when an ordinance allegedly infringes First Amendment rights, States and local governments have the burden to demonstrate that the ordinance is Constitutional.

III. Parking requirements that do not give county officials unfettered discretion to deny a permit or license to operate an adult use are not unconstitutional prior restraints.

OPINION

LANSING, Judge

Kismet Investors, Inc., appeals the district court's decision affirming Benton County's denial of Kismet's application for a variance to allow King's on the Lake, an adult cabaret, to continue operating in its existing location. Kismet also appeals from the court's summary judgment that the Benton County ordinance making King's an unlawful use does not violate the First

Amendment. Because we conclude that the county reasonable denied the variance and that the ordinance does not violate the First Amendment, we affirm.

FACTS

King's on the Lake, also called King's Inn, is a nude-dancing establishment or adult cabaret located in Benton County. Before September 1993, the building that now houses King's housed several restaurants. When Bukaka, Inc., Kismet's predecessor- in-interest, began operating King's as an adult cabaret in September 1993, the county zoning and planning administrator notified Bukaka that it would need a conditional-use permit to operate an adult cabaret. *See Bukaka, Inc. v. County of Benton,* 852 F. Supp. 807, 809 (D. Minn. 1993). Bukaka sought and obtained injunctive relief against Benton County's conditional-use requirement on the grounds that it allowed Benton County administrators too much discretion to satisfy First Amendment requirements. *See Id.* at 813 (granting preliminary injunction); see also *Mga Susu, inc. v. County of Benton,* 853 F. Supp. 1147, 1154 (D. Minn. 1994) (granting permanent injunction).

In June 1993, the Benton County Planning Commission began considering the need for an ordinance to govern adult-use establishments. In January 1994, the commission recommended to the Benton County Board of Commissioners a six-month moratorium on new adult uses in Benton County. The board passed the

moratorium after a public hearing at which no adverse comments were received. On July 14, 1994, the planning commission recommended to the county board that it enact an amendment to the development code, designated Ordinance 242, to govern adult uses. The board, again after receiving no adverse comment at a public hearing, passed the ordinance on July 19, 1994.

Ordinance 242 permits adult uses in areas zoned B-1, B-2, I-1, and I-2 so long as no adult use is located within 500 feet of any area zoned R-1, R-2, or R-3, or within 500 feet of any school, church, daycare facility, hotel, or public park. Benton County, Minn., Development Code § 7.10.0(A) (1998). The ordinance defines adult uses to include "adult enterprises, businesses or places open to some or all members of the public at or in which there is an emphasis on the presentation, display, depiction or description of 'specified sexual activities' or 'specified anatomical areas.'" *Id.* § 7.10.1. The ordinance designates existing adult uses as nonconforming uses until July 31, 1998, and unlawful uses after that date. *Id.* § 7.10.3. Kismet purchased King's in January 1997 and the land on which King's is located in January 1998. Kismet continued to operated King's as an adult cabaret. On July 22, 1998, just days before King's would become an unlawful use, Kismet applied to the Benton County Board of Adjustment for a variance from Ordinance 242. At a public hearing on the variance application, the

board heard testimony from Keith Keller, Kismet's owner, and from many King's employees. Keller testified that Kismet's predecessors had made improvements to King's that cost more than $300,000 and that these improvements made the building suitable only for an adult cabaret. King's employees testified to personal hardships that they would suffer if no longer able to work at King's. Bruce McGlaughlin, an expert planning consultant for King's, testified that King's met the criteria for a variance and that King's did not cause the secondary effects that were the basis for enacting Ordinance 242. The board also heard testimony from Benton County citizens opposed to the variance.

In addition to testifying, McGlaughlin submitted a planning review that summarized his empirical study of King's. The study concluded that King's operation did not result in increased police calls or lower property values. The review also critically analyzed the studies from other municipalities and counties on which Benton County based its conclusion that adult uses lead to adverse secondary effects. McGlaughlin concluded that most of the studies were (1) misrepresented; (2) biased; (3) methodologically flawed; and/or (4) conducted under circumstances distinguishable from Benton County's. The board issued a written order denying the variance. The board found that King's used was not prohibited in its current zoning district, but that the requested variance was not in harmony with the general purposes of the development code. The board further found that

Kismet had not demonstrated a hardship unique to its property, and that the variance, if granted, would alter the family-neighborhood character of the area. In response, Kismet brought this action, requesting that the district court (1) compel the count to grant a variance; (2) declare the ordinance unconstitutional; (3) declare unreasonable the amortization of King's nonconforming use; (4) grant a temporary injunction prohibiting enforcement of the ordinance; and/or (5) find a taking and compel the county to condemn the land and pay fair value. The district court denied Kismet's motion for an injunction and affirmed the county's denial of the variance. The county then moved for summary judgment on the remaining claims. The district court granted the motion against all claims except the constitutional claim. The court found a material issue of fact on whether there were alternative avenues of communication as required by the First Amendment and held an evidentiary hearing on that issue. Relying on evidence produced at the hearing that 100 alternative sites were available for adult uses in Benton County, the district court found the Benton County ordinance constitutional. Kismet appeals the district court's decision affirming the county's denial of the Variance and summary judgment ruling the Benton County ordinance constitutional.

ISSUES

I. Was the board's denial of the variance unreasonable?

II. Does Ordinance 242 violate the First Amendment to the U.S. Constitution?

ANALYSIS

A board of adjustment has broad discretion to grant or deny variances, and we Review the exercise of that discretion to determine whether it was reasonable. *Vanlandschoot v. City of Mendota Heights,* 336 N.W. 2d 503, 508 (Minn. 1983); *Rowell v. Board of Adjustment,* 446 N.W. 2d 917, 921 (Minn. App. 1989), *review denied* (Minn. Dec. 15, 1989). In determining reasonableness, we are guided by the Standards set out in the relevant county ordinance, but a board's authority to grant Variances under the ordinance may not exceed the power granted by statute. *Rowell*, 446 N.W.2d at 921. When proceedings before a board are fair and complete, appellate review is based on the record of the board's proceedings, not the district court's findings or conclusions. *Swanson v. City of Bloomington,* 421 N.W. 2d 307, 313 (Minn. 1988); *VanLandschoot,* 336 N.W. 2d at 508. County boards of adjustment have the exclusive power to grant variances from their zoning ordinances. Minn. Stat. § 394.27, subd. 7 (1998). A variance may be granted only if it is in harmony with the general purposes and intent of local zoning ordinances and if strict enforcement of those zoning ordinances will cause "practical difficulties" or "particular hardship." *Id.* The county variance statute is worded differently

from the municipality variance statutes, which allows variances only on a showing of "undue hardship" and does not refer to practical difficulties. See Minn. Stat. § 462.357, subd. 6(2) (1998).

Under both statutes, however, "hardship" means that (1) "the property in question cannot be put to a reasonable use" absent the variance (2) "the plight of the landowner is due circumstances unique to the property [and] not created by the landowner;" and (3) "the variance, if granted, will not alter the essential character of the locality." Minn. Stat. §§ 394.27, subd. 7; 462.357, subd. 6(2). Economic considerations alone do not constitute hardship if there is a reasonable use for the property absent a variance. Minn. State. §§ 394.27, subd 7; 462.357, subd. 6(2). And, "[n]o variance may be granted that would allow any use that is prohibited in the zoning district on which the subject property is located." Minn. Stat. §§ 394.27, subd. The Benton County Development Code outlines identical factors for consideration of variance applications. Development Code, supra, § 11 .5.1. The landowner applying for a variance carries the "heavy burden" to show that the variance is justified. *Luger v. City of Burnsville,* 295 N.W. 2d 609, 612 (Minn. 1980). Thus, variances are distinguishable from special-or conditional-use permits, which generally should be granted when an applicant meets the conditions specified in the ordinance, and for which the burden rests with the opposing party to show facts compelling denial. *Id.; Westling v. City of St.*

Louis Park, 284 Minn. 351, 355-56, 170 N.W.2d 218, 221-22 (1969).

Minnesota courts have recognized the difference between use and area variances. I*n re Appeal of Kenney,* 374 N.W. 2d 271, 274 (Minn. 1985); *Rowell*, 446 N.W.2d at Use variances allow a use prohibited under the zoning ordinance; area variances control area, height, setback, density, and parking requirements for uses that are permitted by the ordinance. *Kenney,* 374 N.W.2d at 274; *see generally 3* Kenneth H. Young, Anderson's American Law of Zoning § 20.06-.07 (4th ed. 1996). Kismet seeks to vary the uses permitted for its property under the zoning ordinance and thus seeks a use variance.

In Minnesota, most use variances are prohibited by statue. Minn. Stat. § 394.27, subd. 7 (no variance shall be allowed if use prohibited in zoning district). Local governments may grant used variances, however, when a use is not prohibited in the zoning district, but the use is limited by another portion of the zoning ordinance. *See Kenney,* 374 N.W.2d at 274-75 (holding county had authority to grant use variance from ordinance prohibiting boathouses or addition to boathouses). The parties agree that King's use is not prohibited in its zoning district, but is instead prohibited by the adult-use sections of the development code. Thus, this case falls within the small number of use variances allowable under Minnesota statues.

Kismet disputes the board's finding that Kismet failed to demonstrate hardship to support its requested variance. Kismet argues that substantial and costly improvements to the building demonstrate hardship. Kismet cites Minnesota variance cases affirming findings of hardship based on financial investment combined with practical difficulties of complying with the zoning ordinance. Each of the cases Kismet cites, however, deals with an area variance, not a use variance, which is what Kismet seeks. *See Merriam Park Community Council, Inc. v. McDonough,* 297 Minn. 285, 293, 210 N.W.2d 416, 421 (1973) (affirming variances from setback requirements, parking Requirements, and maximum number of apartment units), *overruled on other grounds by Northwestern College v. City of Arden Hills,* 281 N.W.2d 865 (Minn. 1989); *Arcadia Dev. Corp. v. City of Bloomington,* 267 Minn. 221, 228, 125 N.W. 2d 846, 851 (1964) (holding that city's denial of variance from sign-standards ordinance was arbitrary and capricious); *Rowell,* 446 N.W.2d at 922-23 (affirming variance from setback requirements).

Although courts historically have required variance applicants to demonstrate that there was no other reasonable use for their land, some jurisdictions, including Minnesota, have more recently recognized that area variances may be granted on a lesser showing of practical difficulties. *See Rowell,* 446 N.W.2d at 922 (citing *McDonough,* 297 Minn. At 292, 210 N.W.2d at

420); *see also Ogawa v. City of Des Peres,* 745 S.W. 2d 238, 242 (Mo. Ct. App. 1987) (applying lower standard for area variances); *Ivancovich v. City of Tucson Bd. Of Adjustment,* 529 P.2d 242, 250 (Ariz. Ct. App. 1974) (same); *Sprague-Covington Co. v. Zoning Bd. Of Review,* 230 A.2d 419, 420 (R.I. 1967) (same); *see generally Young, supra,* § 20.48-.51.

Kismet's argument requires us to consider whether a lesser showing of practical difficulties can justify a use variance. Minnesota appellate courts have not directly addressed this issue, but other jurisdictions that recognize the lower practical-difficulties standard for *area* variances continue to require the more demanding hardship standard for *use* variances. *See, e.g., vancovich,* 529 P.2d at 250 (use variances require more stringent showing). After a careful review of the variance statue and the relevant precedents, we conclude that Minnesota landowners seeking use variances must demonstrate that they will suffer particular hardship absent the variance. Practical difficulties alone cannot justify a use variance.

We recognize that Minnesota's county variance statute appears to cast practical difficulties *or* particular hardship in the alternative. But the Minnesota legislature adopted this dual variance standard in 1974, when the differing treatment of use and area variances was well established in the caselaw. *See* 1974 Minn. Laws Ch. 571, § 27; *Meister v. Western Nat'l. Mut. Ins. Co.,* 479 N.W.2d 372, 378 (Minn. 1992) (stating courts

should presume legislature acted with understanding of existing, related legislation). The statue, read in the context of the caselaw, supports the conclusion that the standard of practical difficulties was intended to apply to area variances and the standard of particular hardship was intended to apply to use variances. *See In re Village of Bronxville,* 150 N.Y.S.2d 906, 908 (N.Y. App. Div. 1956) (interpreting nearly identical New York variance statue allowing variances based on "practical difficulties" or "unnecessary hardship" to create two different variance standards-one for area variances and one for use variances). Moreover, to interpret the statutory language to apply both standards to use variances would read the more demanding particular-hardship standard out of the statue. *See* Minn. Stat. § 645.17 (1998) (stating legislature intends entire statue to be effective). Our construction of the statue gives practical meaning to both standards.

Applying the particular-hardship standard, we must next determine whether the board reasonably found that Kismet's property could be put to other reasonable uses; that Kismet's plights was not unique to the property; and that granting Kismet's requested variance would change the essential character of the locality.

The record supports the board's finding that there are other reasonable uses for Kismet's property, including a restaurant or resort. Kismet agues that improvements to the property make it useful only as a adult cabaret. A

landowner's significant investment in the property, however, does not demonstrate the absence of other reasonable uses. *See* Minn. Stat. § 394.27, subd. 7 (stating economic considerations alone do not justify variance). Some courts have found hardship when the costs of alternative uses are so prohibitive that they will effectively prevent the property from being put to another use. *See generally* Young, *supra,* § 20.22, at 492-93 n. 13. But Kismet has only shown the cost of remodeling King's to operate as an adult cabaret; Kismet has offered no evidence on the costs of remodeling the building for alternative uses or evidence that the costs would be prohibitive. Kismet has also failed to demonstrate that its plight is unique to the land. Kismet's circumstances as the only landowner currently seeking to operate as an adult uses in Benton County does not make its plight unique. The adult-use ordinance applies in a similar fashion to all those who own commercially or industrially zoned property within 500 feet of a protected use. None of these landowners may operate adult uses on their land. *See Garibaldi v. Zoning Bd. Of Appeals,* 303 A.2d 743, 745 (Conn. 1972) ("[I]t would be rare case where*** a regulation which prescribes a minimum distance between certain types of liquor outlets would cause a hardship different in kind from that felt by other properties in a zone").

Further, Kismet's failure to show that other uses are cost prohibitive prevents it from claiming a unique plight

based on its investments. *Cf. Halberstadt v. Borough of Nazarath,* 687 A.2d 371, 373-74 (Pa. 1997) (affirming variance because razing heavy fortress-like building for alternative uses cost prohibitive); *see generally* Young, *supra,* § 20.37. The board reasonably concluded that Kismet's plight was not unique to the land.

Kismet argues that its predecessor made improvements to the property in Reasonable reliance on the federal injunctions against Benton County's conditional-use-permit requirement. This argument is in oppostion. The injunction against Benton County's unconstitutional conditional-use-permit requirement included no guarantee that Benton County would not find a constitutionally permissible method of regulating adult uses. *Cf. Bruzzese v. Board of Appeals*, 179 N.E.2d 269-271 (Mass. 1962) (reasoning that fact that plaintiff spent money in anticipation of being granted a variance did not justify a finding of hardship).

Because it has demonstrated neither that its land can be put to no other reasonable use nor that its plight is unique, Kismet has not met its burden to show particular hardship. Accordingly, we affirm the board's denial of variance. The district court granted summary judgment on Kismet's claim that the Benton County ordinance violated the First Amendment, and thus we review that ruling under a summary judgment standard. *See Cummings v. Koehnen,* 568 N.W.2d 418, 420 (Minn. 1997) (on appeal from summary judgment, reviewing court determines

whether case raises genuine issues of material fact and whether district court erred in application of law). But because the issue of reasonable alternative avenues of communication received an evidentiary hearing, we will not reverse the district court's findings on that issue unless they are clearly erroneous. See Minn. R. Civ. P. 52.01 ("[f]indings of fact, whether bases on oral or documentary evidence, shall not be set aisle unless clearly erroneous"); *DI MA Corp. v. City of St. Cloud,* 562 N.W.2d 312, 321 (Minn. App. 1997), *review denied* (Minn. July 28, 1997).

Although statutes and ordinances generally carry a presumption of constitutional validity, when an ordinance allegedly infringes First Amendment rights, the local government bears the burden of demonstrating that the ordinance is constitutional. *See Association of Community Org. for Reform Now v. City of Frontenac,* 714 F.2d 813, 817 (8th Cir. 1983) (citing *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 91 S. Ct. 1575, 1577-78 (1971)); *see also J & B Entertainment, Inc. v. City of Jackson,* 152 F.3d 362, 370-371 (5th Cir. 1998); *Phillips v. Borough of Keyport,* 107 F.3d 164, 172-73 (3d Cir. 1997). This distinguishes First Amendment challenges to Zoning ordinances from police-power challenges, which require the challenger to Demonstrate an unconstitutional exercise of a local government's police powers. *See, e.g., City of St. Paul v. Dalsin,* 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955) (burden on appellant to show ordinance not

within police power). A.17

Ordinances that regulate adult uses based on their secondary effects are reviewed as time, place, manner regulations. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S. Ct. 925, 930 (1986). Such ordinances must be content-neutral, must be designed to advance a substantial government interest, and must allow reasonable alternative avenues of communication. *Id.* at 50, 106 S. Ct. at 930; *Holmberg v. City of Ramsey* 12 F.3d 140, 142 (8th Cir. 1993) (*Holmberg I*); *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225, 229 (Minn. App. 1997), review denied (Minn. Nov. 18, 1997). Courts have recognized ordinances that attempts to prevent the adverse secondary effects of adult uses as content-neutral regulations that advance a substantial government interest. *See City of Erie v. Pap's A.M.*, _____U.S. _____, _____, 120 S. Ct. 1382, 1392-95 (2000) (plurality opinion); *Renton,* 475 U.S. at 48-49, 106 S. Ct. at 929-30, *Fantasy House,* 569 N.W.2d at 229. And the Supreme Court has held that a city need not demonstrate secondary effects within its own experience, but instead may rely on studies conducted by other cities, so long as the studies are "reasonably believed to be relevant to the problem that the [city] addresses." *Renton,* 475 U.S. at 51-52, 106 S. Ct. at 931. We conclude, as did the district court, that Ordinance 242 is content-neutral and designed to advance a substantial government interest. The preamble to Ordinance 242 includes findings that adult

uses cause secondary effects and states that the ordinance is intended to ameliorate the secondary effects of adult uses in Benton County. And the ordinance reasonably relies on adult-use studies from St. Paul; Indianapolis; Los Angeles; Phoenix; Rochester, Minnesota; Adams County, Colorado; and Amarillo, Texas.

Kismet argues that Benton County's reliance on these studies was unreasonable because the studies are flawed, because they address circumstances different from Benton County's, and because King's was unable to demonstrate empirically that its s operation has not caused secondary effects. We reject these arguments for several reasons.

First, neither Kismet nor its predecessor raised these issues before the board of commissioners at the public hearings held before the adoption of Ordinance 242. In determining whether the county reasonably relied on the studies, we necessarily review the information available to the county when it passed the ordinance. *See City of Ramsey v. Holmberg,* 548 N.W.2d 302, 306 (Minn. App. 1996) (*Holmberg II)* (studies that were bit before the city when it enacted the ordinance failed to raise a genuine issue on whether "the city reasonably believed that the businesses to which the ordinance applies produce at least some of the unwanted secondary effects experienced by other cities"), *review denied* (Minn. Aug. 6, 1996). At best, Kismet's criticism of the studies

raises a question of whether adult uses actually cause secondary effects. The resolution of that question is precisely the type of fact-finding best left to the county's comparatively superior ability to "amass and evaluate the vast amount of data" available and "make predictive judgments" about its own circumstances. *Turner Broad. Sys., Inc. v. F.C.C.,* 522 U.S. 180, 195, 117 S. Ct. 1174, 11898 (1997) (quotation omitted). It is not our function, "at least in absence of overwhelming evidence to the contrary, to second-guess the scientific accuracy of a legislative determination of fact." *Minnesota State Bd. Of Health by Lawson v. City of Brainerd,* 308 Minn. 24, 32, 241 N.W.2d 624, 629 (1976).

Second, the county reasonably relied on adult-use studies addressing uses similar to the adult uses covered by Ordinance 242. *See Holmberg II,* 548 N.W.2d at 306 (local government may reasonably rely on studies addressing "reasonably similar businesses") (quoting *ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413, 1418 (8th Cir. 1994)). Finally, the county need not demonstrate which secondary effects are attributable to each of its adult uses, but may pass ordinances to address the secondary effects of adult uses as a class and to address both existing and potential adult uses in Benton County. *See Mitchell v. Commission on Adult Entertainment Establishments,* 10 F.3d 123, 138 (3d Cir. 1993) (stating that state need only show that adult entertainment Establishments as a class cause secondary

effects); *see also Vicary v. City of Corona,* 119 F.3d 8, 1997 WL 406768 (9th Cir. July 18, 1997) (reversing district court reasoning that an ordinance could be facially constitutional but unconstitutional as applied to adult use not shown to produce secondary effects). Kismet asserts that a recent Ninth Circuit opinion requires a more exacting analysis to determine whether a local government reasonably relied on an adult-use study. *See Alameda Books, Inc. v. City of Los Angeles, 222* F.3d 719, 724, 2000 Wl 1047892, at *5 (9th Cir. July 27, 2000) (1977 study finding that concentration of adult uses causes secondary effects does not justify ordinance prohibiting multiple adult uses in one building). We conclude, however, that *Mitchell* and *ILQ* demonstrate a better application of *Renton's* holding that a local government may rely on studies from other localities if the studies are "reasonably believed to be relevant to the problem that the [locality] addresses." *Renton,* 475 U.S. at 51-52, 106 s. Ct. at 931.

The last constitutional hurdle is whether Ordinance 242 leave reasonable alternative avenues of communication for adult uses. The district court's determination of the number of sites available for adult uses is factual finding reviewed only for clear error. *David Vincent, Inc. v. Broward County,* 200 F.3d 1325, 1333 (11th Cir. 2000). But the court's methodology for determining the number of sites and its conclusion about whether that number of sites provides reasonable alternative avenues

of communication are issues of law that we review de novo. *Id.* at 1333, 1335. We also review de novo the court's construction of Ordinance 242. *See Rowell,* 446 N.W.2d at 920.

We see no error in the court's construction of Ordinance 242's requirement that adult uses and protected uses must be separated by 500 feet. The district court confirmed Benton County's method of measuring from building to building because the ordinances defined most adult uses and most protected uses in terms of the buildings they occupy. *See* Development Code, *supra,* §§ 7.10.1, 7.10.2. When adult uses are not in a building, however, the 500 feet is measured from the adult use. And when the protected use is residentially zoned property, the measurement is from the lot line of that residential use. We conclude that the court correctly applied the plain language of the ordinance.
Using the county's measurement methods, the district court found that 100 sites were available for adult uses in Benton County. The district court's finding was not clearly erroneous. The court reasonably credited the testimony of Benton County development director Ron Peterson, who conducted the measurement for the county, and rejected the testimony of King's expert, who used all lot-line-to-lot-line measurements. Kismet argues that the development code's discretionary parking requirements render all of the sites unavailable, but we find this argument unpersuasive. Nothing in the county's parking requirements impinges on Kismet's

ability to use any of the 100 sites for an adult use. The parking requirements may limit the amount of land on which Kismet may build, but the First Amendment does not guarantee Kismet a certain size piece of land or building for its adult use. *See Broward,* 200 F.3d at 1336 ("making due with less space than one desired" is impediment to relocation of adult use that is not of constitutional magnitude).

We also reject Kismet's argument that the parking requirements constitute a prior restraint unconstitutional under the First Amendment. Zoning provision that allow adult uses only y at the unfettered discretion of a locality violate the First Amendment. *See, e.g., Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1361-62 (11th Cir. 1999) (finding that requirement that adult uses apply for discretionary zoning exceptions precluded reasonable alternative avenues of communications), *cert. denied,* 120 S. Ct. 1594 (2000). But the Benton County parking requirements do not give county officials discretion to deny Kismet's ability to operate an adult use in Benton County and thus are distinguishable from prior restraints that have been fatal to adult-use ordinances. *See Young v. City of Simi Valley,* 216 F.3d 807, ___, 2000 WL 780991, at ___(9th Cir. June 20, 2000) (9th Cir. June 20, 2000) (involving adult use that could not operate if private parties vetoed it); *Lady J.,* 176 F.2d at 1361 (involving adult use that could not operate without zoning exception); *Bukaka,* 852 F. Supp. At 812 (involving adult use that could not

operated without conditional-use permit). Simply put, nothing in the development code required Kismet to apply for a permit or license to operate as an adult use. Absent these circumstances, we do find a prior restraint within the meaning of the First Amendment. *CF. Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130, 112 S. Ct. 2395, 2401 (1992) (holding that ordinance requiring permit and fee for public speeches, parades, or assemblies was prior restraint on speech); *Stokes v. City of Madison,* 930 F.2d 1163, 1168 (7th Cir. 1991) (prior restraint exists when regulation gives officials power to deny use of a forum in advance of actual expression).

The touchstone of *Renton's* requirement of alternative avenues of communication is that adult use should not be denied a reasonable opportunity to operate within the locality. *DI MA Corp.,* 562 N.W.2d at 321 (citing *Renton,* 475 U.S. at 54, 106 S. Ct. at 932). We conclude that the 100 available sites provide ample opportunity for adult uses to operate in Benton County and thus provide reasonable alternative avenues of communication. *Cf. DI MA Corp.,* 562 N.W.2d at 322 (finding 15 alternative sites sufficient).

DECISION

The Benton County Board of Adjustment reasonably denied Kismet's variance application, and we affirm that denial. Because we conclude that Ordinance 242 is

content neutral, designed to promote a substantial government interest, and leaves reasonable alternative avenues of communication for adult uses, we also affirm the district court's summary judgment determining that the ordinance is constitutional.

Affirmed.

A.25

STATE OF MINNESOTA
COUNTY OF BENTON

IN DISTRICT COURT
SEVENTH JUDICIAL DIST.

Kismet Investors, Inc., a Minnesota corporation,

Plaintiff,

vs.

County of Benton,

Defendant.

FINDINGS OF FACT CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT AND JUDGMENT

The above-entitled matter came before the Honorable James W. Hoolihan, Judge of District Court, on the 12 day of November, 1999.

Randall D.B. Tigue, Esq., appeared on behalf of the Plaintiff, Kismet Investors, Inc.,

Kenneth H. Bayliss, Esq., appeared on behalf of Defendant, County of Benton.

Plaintiff has a four (4) count complaint against the Defendant. The parties agreed to bifurcate the issued and have the Court first decide Count I, Defendant's challenge to the validity of the Benton County Board of Adjustment's denial of the variance request.

In findings of fact, conclusions of law and order for

judgment and judgment, this court affirmed the board's denial of the variance request as a valid exercise of its power and denied Plaintiff's requested relief for a temporary restraining order and temporary injunction against enforcement of Benton County Development Code, Ordinance No. 242. See *Kismet Investors, Inc. v. County of Benton*, File No. 05-C5-98-001240, findings of fact, conclusions of law, and order for judgment and judgment, dated April 2, 1999.

Defendant then moved the court for summary judgment on Counts II, III and IV of thePlaintiff's complaint. Count II challenged the Constitutionality of the Benton County Zoning Ordinance on First and Fourteenth Amendment grounds. Count III challenged the reasonableness of Benton County Ordinance 242 in its amortization provision. Count IV challenged the constitutionality of a taking or damaging of Plaintiff's property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 13 of the Minnesota Constitution. The court granted summary judgment on Counts III and IV, but denied summary judgment on Count II and ordered an evidentiary hearing to be held on the sole issue of whether Benton County has provided for reasonable alternative avenues of communication for adult use business

to ensure freedom of communication rights under the First and Fourteenth Amendments of the United States Constitution. The court also denied the Plaintiff's motion to amend its complaint in light of the passage of new amendments to Minn. Stat..394.21, Subd. 1a and Minn. Stat. 462.357, Subd. 1c concerning zoning ordinances and prohibitions on amortization by counties and local municipalities. See *Kismet Investors, Inc. v. County of Benton*, File No. C5-98-1240, findings of fact, conclusions of law and order for judgment and judgment, dated July 7, 1999.

The evidentiary hearing on Count II was held on November 12, 1999.

Now having duly considered the arguments of counsel, the documents and proceedings herein, together with the applicable law, this Court **ORDERS:**

The Defendant's motion for summary judgment on Count II of the Plaintiff's complaint is **GRANTED.**

The findings, conclusions, orders and memoranda from the Court Orders dated April 2, 1999, and July 7, 1999 are incorporated by reference as part of this Order.

The attached memorandum is made part of this Order.

FINDINGS OF FACT

1. Kismet Investors, Inc., is a 302A Minnesota corporation incorporated in December of 1996. it has operated

the business known as "King's on the Lake" in Benton County, Minnesota since January 2, 1997. The business features live, nude dance or cabaret entertainment and is currently doing business as "The King's Inn." The business itself has operated since September of 1993 under different ownership. At that time Benton County had a conditional use permit requirement for all recreational uses, which included adult use facilities. This previous ordinance was challenged by Plaintiff's predecessors in interest and was both temporarily and permanently enjoined by the United States District Court in the District of Minnesota. See *Mga Susu, Inc. v. County of Benton*, 853 F. Supp. 1147 (D. Minn. 1994) and *Bukaka, Inc. v. County of Benton*, 852 F. Supp. 807 (D. Minn. 1993).

2. In June of 1993, Benton County was considering whether, and in what form, to adopt a new adult use zoning ordinance. A scheduled discussion of the potential regulation of adult use business was planned and held on June 24, 1993, by the Benton County Planning and Zoning Commission (Commission). The Benton County Attorney and Planning and Zoning Administrator presented information on various legal aspects of the regulation of adult use businesses. The outline indicated that any zoning restrictions by Benton County must be: 1) content-neutral; 2) time, place and manner restrictive; 3) defined to serve a substantial government interest; and 4) not

unreasonably limit alternative avenues of communication. As part of the process of consideration of other ordinances and study of possible secondary negative effects of adult use businesses, a copy of the City of St. Cloud, Minnesota adult use ordinance was also distributed to the Commission.

3. On November 18, 1993, Benton County Planning and Zoning Commission continued discussion on adult use land regulations, specifically addressing information regarding concerns and activities or other municipalities, and their adult use establishment. Benton County considered numerous other municipalities' studies or negative secondary effects of adult use businesses and was aware of valid land use regulations, which had been passed, based upon the secondary effects analysis. The commission unanimously passed a resolution for the county attorney's office to further research a possible adult use ordinance and submit potential ordinance language, which was proper and enforceable.

4. On May 26, 1994, the Commission held a publicly noticed meeting in which it considered adopting a proposed resolution. The proposed resolution stated:

Whereas, The Benton County Planning Commission is concerned about the possible adverse secondary effects of sexually oriented businesses on adjacent properties; and

Whereas, The Benton County Planning Commission upon review of studies conducted by the cities of Phoenix,

Arizona; Indianapolis, Indiana and Austin, Texas is aware of an increase in overall crime rates in areas near sexually oriented businesses; and

Whereas, The Benton County Planning Commission seeks to minimize any potential negative impact on the value and marketability of land adjacent to sexually oriented businesses; and

Whereas, The Benton County Planning Commission hopes to provide space for location of sexually oriented businesses in appropriately zoned districts in the county, (emphasis added)

Therefore, it is resolved that the Benton County Planning Commission shall commence the development and adoption of an ordinance addressing these concerns.

(Benton County Planning Commission, Minutes from Planning Session on May 26, 1994). The Planning Commission approved the proposed resolution with the only modification being replacement of the word "hopes" with the word "intends"

5. On June 23, 1994, the Commission held another publicly noticed open work session on a proposed adult use ordinance. It discussed specific language from the City of Ramsey in Anoka County, Minnesota, separate distances, amortization periods and enforcement of zoning ordinances.

6. On June 28, 1994, the Benton County published notice of a final public hearing where both the commission an d the Benton County Board had an intent to amend the Benton

County Development Code regarding adult use establishments in Benton County. The notice included specific language of a proposed ordinance for consideration and request for public input.

7. On July 14, 1994, the Commission had its final meeting for consideration of the auld use amendment. No one at the meeting spoke in opposition to the amendment. A motion to approve the amendment passed on a unanimous vote. Neither the Plaintiff nor the Plaintiff's predecessor in interest attended this or any other Commission meeting concerning the regulation of adult use facilities.

8. On July 19, 1994, the Benton County Board held a publically noticed and regularly scheduled meeting. Proposed amendments to the County Development Code regarding adult uses were presented. The Board did not receive any comments for or against the proposed amendments. The Board voted unanimously to adopt the amendments, which became Benton County Ordinance No. 242.

9. The adopted ordinance provides for an amortization period as expressed in Benton County Development Code 7.10.3. It state that nonconforming uses must cease at the end of approximately four years:

Adult uses established prior to the enactment of Benton County Ordinance 235 shall be permitted and regulated as

nonconforming uses until July 31, 1998 at which time such uses shall become unlawful.

10. The ordinance also provides a 500 foot setback requirement of adult use facilities from residentially-zoned areas. Benton County Development Code, 7.10.2 state:

"No adult use shall be located with five hundred (500) feet of;

1. Any area zoned R-1, R-2 or R-3." [residential areas].

"Adult use facilities are allowed to operate in B, B-2, I1 and I-2 zones."

11. The Plaintiff purchased the business know as the King's Inn in January of 1997 and subsequently purchased the real property, which is the subject of this action, one year later in 1998 for approximately $250,000 by contract for deed. At the time of the purchase of the real property by the Plaintiff, theBenton County Adult Use Ordinance No. 242 had been in existence for approximately three and one-half years and compliance with the setback provisions of the ordinance required the adult use to cease within approximately six (6) months from the date of the real property purchase.

12. Plaintiff's current business is lawfully in a B zoned area, however, it is within 500 feet of a residentially zoned area and is located approximately 150 feet from the nearest residence. This makes the Plaintiff's business a nonconforming

use and is the subject of the instant case. The amortization period of the ordinance allowed the Plaintiff to operate the King's Inn as an adult use business until July 31, 1998.

13. On July 22, 1998, Plaintiff applied for a variance from the Board to continue operations after the end of the amortization period. The application was denied on September 17, 1998. This lawsuit was commenced in October of 1998.

ALTERNATIVE SITES

14. Ronald Peterson, the Benton County Development Director, who oversees county planning and zoning administration, identified 101 sites in unincorporated Benton County that are available and properly zoned for adult uses such as the King's Inn. He testified that the identified sites had road access and were visible from nearby roadway; that they either had existing buildings or would permit a building; were not encumbered by wetlands; would not be precluded by septic system issue; and were more than 500 feet from any residentially zoned area.

15. Ronald Peterson was a credible witness and the court accepts as fact that there are 101 properly zoned sites reasonable available in Benton County as alternative sites for a business such as the King's Inn, except as noted in No. 20 below.

16. Plaintiff's expert, Robert McLaughlin, would

disqualify 57 of the identified sites by interpreting the county ordinance to require setback measurements from boundary line to boundary line. The court rejected this interpretation as contrived and unreasonable and not consistent with the county's application of the setback requirements.

17. McLaughlin then disqualifies all the remaining sites on one or more basis such as access, size, current use or some other reason such as his interpretation that the adult use would trigger the need for a permit requiring parking to be solely determined b the county and therefore subject to whimsical discretionary requirements. Mr. McLaughlin's testimony is not credible and the court rejects his conclusions except as noted in No. 20 below.

18. Curtis Curry testified on behalf of the Plaintiff. Mr. Curry is a builder and carpenter and testified to the difficulties he experienced in getting appropriate building permits when working on "adult use" businesses. Mr. Curry was not a credible witness and his testimony as largely irrelevant as Benton County does not require building, electrical or plumbing permits.

19. In this southeast section of Minden Township, Plaintiff disqualified a site because his expert concluded there was a shrine and park in the southeast quadrant of the intersection and that prohibit placement of an adult use facility.

Plaintiff was mistaken. There is no park at that location and the shrine is a private display and not a county park or exhibit.

20. One identified site located in Sec.10, west of Highway 10, in Watab Township had no access. While there is no testimony to indicate whether access is possible or practical, the court finds that at this time this location is not a reasonable alternative site.

21. The population of Benton County is 30,000 and approximately 15, 000 of those people live in unincorporated portions of the county.

22. At the present time there is one adult use establishment in unincorporated Benton County.

23. There is very little for adult use establishments in the unincorporated areas of Benton County as evidenced by the existence of only one establishment and the lack of any application for additional uses.

24. Six of the identified sites are occupied by active businesses. This fact makes them less available but does not exclude them from the pool of alternative sites.

CONCLUSIONS OF LAW

1. There are 100 available sites without significant legal impediments to their use as adult entertainment businesses and they provide reasonable alternative avenues of communication.

2. The proper method of measuring setbacks under the

Benton County Development Code is from the building or portion of the building that incorporates the adult use in those instances where this term is included in the definition of the particular type of adult use, or to the place where the sexually -oriented activity is taking place with respect to other adult uses.

3. The proper method of measuring segregated use setbacks is to the property line of a residentially zoned area with respect to residential area setbacks and to the buildings which constitute the segregated use, such as churches, daycare centers and schools. With respect to other segregated uses.

4. The off-street parking provisions and land use permit provisions of the ordinance do not interfere with the availability of the adult use sites.

5. The Benton County Adult Use Ordinance is constitutional in all respects.

6. Neither party is entitled to costs or disbursements.

ORDER

IT IS ORDERED:

1. The adult use provisions of the Benton County Development Code are declared constitutional.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

A37

dated: 12/22/99

/s/_____

James Hoolihan

Judge of District Court

JUDGMENT

I hereby certify that the foregoing constitutes the judgment of this Court.

Dated: 12/27/99

TIMOTHY R. ROBERTS

Court Administrator

/s/_____

Deputy Ct. Administrator

MEMO

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits of any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn.R. Civ. P. 56.03. The party moving for summary judgment must demonstrate that no genuine issue of material fact exists. *Thiele v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988). The evidence must be viewed in the light most favorable to the non-moving party. *Offerdahl v. University of Minnesota*, 426 N.W. 2d 425, 427 (Minn. 1988). The non-moving party may not rest on mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. See Minn. R. Civ. Proc. 56.05. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). After the moving party makes out a prima facie case, the non-moving party must come forward with facts that raise a genuine issue for trial. *Thiele*, 425 N.W. 2d at 583 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

The court does not resolve or decide issues of fact, but

only determines whether there are issues of material fact to be tried. *Nord v. Herreid*, 305 N.W. 2d 337, 339 (Minn.1981). If a plaintiff cannot support each essential element of his or her claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. See *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W. 2d 845, 848 (Minn. 1995) (citing *Celotex*, 477 U.S. at 322-23). Summary judgment should not be granted if reasonable person, after reviewing the evidence, might reach different conclusions. *Honathan v. Kvaal*, 403 N.W. 2d 256, 259 (Minn. Ct. App. 1989). Speculation or general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial. *Bob Useldinger & Sons Inc. v. Hangsleben*, 505 N.W. 2d 323, 328 (Minn. 1993) (speculation); *Erickson v. General United Life Ins. Co.*, 256 N.W. 2d 255, 259 (Minn.1977) (general assertions).

I. Reasonableness of Benton County Adult use ordinance in providing alternative avenues of communication

In Minnesota, the constitutionality of municipal ordinances is presumed, including adult use ordinances, and the burden of proving otherwise rests on the party attacking its validity. *City of Ramsey v. Holmberg*, 548 N.W. 2d 302, 305 (Minn. Ct. App. 1996) (citing *City of St. Paul v. Dalsin*, 245

minn. 325, 329 71 N.W. 2d 855, 858, (1955)). Establishment which offer nude dancing or nude cabaret may be entitled to First and Fourteenth Amendment protection as a form of expression, see *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W. 2d 708, 715 (Minn. 1975); *California v. LaRue*, 409 U.S. 109, 118, 93 S. Ct. 390, 397, 34 L. Ed. 2d 342 (1972). In order to survive First Amendment scrutiny, such regulations must be content-neutral, "designed to serve a substantial governmental interest" and cannot unreasonably limit alternative avenues of communication. *City of Ramsey*, 548 N.W. 2d at 305 (quoting *Renton*, 475 U.S. at 46, 106 S. Ct. at 928). Where an ordinance does not ban adult uses completely, but merely limits the areas in which they may operate, it is properly analyzed as a time, place and manner regulation.
City of Ramsey, 548 N.W. 2d at 305. See *City of Ramsey v. Playtime Theaters Inc.*, 475 U.S., 41, 46, S. Ct. 925, 928, 89 L. Ed. 2d 28 (1986).

Since Benton County ordinance 242 does not ban adult use facilities in the County completely and attempts to limit the areas in which they may operate, the regulation is a time, place and manner regulation and is controlled by and properly analyzed under the test in *City of Ramsey v. Renton v. Playtime Theaters*. The first and second parts of the *Renton* test were previously analyzed by this Court and the ordinance was found

to be constitutional as content-neutral and narrowly tailored to serve a substantial governmental interest. (April 1, 1999 and July 7, 1999 orders).

The third part of the *Renton* test is to determine whether Benton County's ordinance provides reasonable alternative avenues of communication for the exercise of that First Amendment right.

In making this determination, the First Amendment requires Benton County to refrain from effectively denying the Plaintiff a reasonable opportunity to operate or open an adult use facility within the County. See *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932. Under *Renton*, when an adult use ordinance restricts free speech in order to control the negative effect of adult establishments, it "must provide reasonable alternative avenues of communication." *City of Crystal* 569 N.W 2d at 230 (citing *City of Renton*, 475 U.S. at 50, 106 S. Ct. at 930). A city cannot ban adult uses totally or fail to provide reasonable sites for relocation that are sufficient for uses existing within its borders at the time of the enactment, thereby forcing a business to close. *Alexander . City of Minneapolis*, 928 F. 2d 278, 283-84 (8th Cir. 1991). The Supreme Court has stated this does not mean "that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that

matter, will be able to obtain sites at bargain prices." *American Mini Theaters, Inc.*, 427 U.S. at 71, n. 35, 96 S. Ct. at 2453, n. 35 (plurality opinion). Each business "must fend for themselves in the real estate, on an equal footing with other prospective purchasers and lessees..." *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932. If an ordinance provides potential relocation sites in accessible zoned areas in the community, such ordinances do not unreasonably limit alternative avenues of communication. *Holmberg v. City of Ramsey*, 12 F. 3d 140, 144 (8th Cir. 1993).

In deciding this issue, the Court must look at specific evidence of the amount of land open to use for adult use businesses. Providing fifteen (15) to seventeen (17) possible locations has been found sufficient to meet the requirements of reasonableness. *DiMa Corp. v. City of St. Cloud*, 562 N.W. 2d 312, 233 (Minn. Ct. App. 1997). In *Holmberg*, providing 35 percent of the city's land, both developed and undeveloped, zoned for commercial uses provided reasonable opportunity, despite claim that relocation costs would put owner out of business. *Holmberg*, 12 F. 3d at 144.

In the above-entitled action, the Defendant asserts that there are over 2400 acres available for commercial and industrial uses in Benton County. Of these the County claims that there are 101 commercial and industrial sites within the county where a locating adult use business would not run afoul

of setbacks. A. 43

Plaintiff contends that 57 of the sites would be disqualified by a property line to property line measurement and that much of the land has subdivision requirements that would leave its availability at the discretion of the Benton County Board.

Where statutory language is clear and unambiguous a court must effect to that plain language. *State v. Burrell,* 506 N.W. 2d 34, 37 (Minn.Ct. App. 1993). The Benton County Development Code defines "setback" as: the minimum horizontal distance between a structure, sewage treatment system, or other facility and an ordinary high water level, sewage treatment system, top of a bluff, road, highway, property line, or other facility (emphasis added). Benton County Development Code 3.155. The code further defines an "adult cabaret" as: a building or portion of a building used for providing dancing or other live entertainment...Benton County Development Code, 7.10.1 Sec. 7.10.2 provides that the setback is from the "adult use" to "any area zoned R-1, R-2. Or R-3."

From this language, it is clear and unambiguous to the court that the setback as defined in the Benton County Code requires measurement from the adult use facility to the property line of the residentially zoned area. In other words, the setback

requirement of 500 feet is measured from the building providing adult use to the property line of the adjacent residence or residences. It is therefore reasonable for the Benton County Ordinance 242 to requires adult use facilities to not be located within 500 feet of residential areas so as not to restrict alternative avenue of communication for those facilities.

Plaintiff also contends that some sites are too remote. With the exception of one site noted by the court, all the sites are along Trunk Highway 10 or 23, or along State Highways 25 or 95, or along paved county highways. Access is easily available to the sites from these roads. The sites meet the legal standard of available access. *Woodall III*. 49 F. 3d at 1126 (site not to be excluded simply because not near heavily trafficked area).

Plaintiff contends 6 sites should be excluded because the parcels are currently occupied by large, active businesses. No evidence was presented to the court to show that these parcels were unavailable. Mere use by another business does not in and of itself render a site legally unavailable. *Hickerson v. City of New York*, 146 F. 3d 99 (2nd Cir. 1998).

Plaintiff finally contends that all the sites are legally inadequate because they are available only in the discretion of the governmental officials of Benton County. The substance of Plaintiff's argument is changing from a current industrial or

commercial use to an adult use would trigger a zoning review and the county could require off-street parking spaces "as determined by the County Planning Commission." (9 Sec. 9.2.1 (c), Benton County Development Code). Plaintiff argues that this "{unbridled discretion" could be used to impose impossible to provide parking requirements, thus preventing location of an adult use business.

This argument is unfounded in fact and highly speculative in outcome. Many of the identified sites are large enough to accommodate any reasonable parking requirements. Counties are required by statute to act on zoning matters within 60 days of a request. Minn. Stat. Sec. 15.99,Subd/ 2. If the county were to act in an arbitrary or unreasonable manner with respect to parking or any other zoning issue, Plaintiff would have an adequate remedy at law. Minn. Stat. 606.01 gives the right to petition for writ of certiorari if there is no right of judicial review. Upon review b writ of certiorari, any decision that is "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it,will be reversed. *Dietz v. Dodge County*, 47 N.W. 2d 237, 239 (Minn. 1992); *Scott County Lumber v. City of Shakopee*, 471 N.W. 2d 721, 727 (Minn. Ct. App. 1988), review denied (Minn. Mar. 23, 1988).

Plaintiff also raised concerns that the zoning

administrator might hinder the issuance of a land permit and thus prohibit an adult use business. The zoning administrator is required to follow the ordinance and make decisions to accomplish the purpose of the ordinance. An appeal may be taken from any decision by the zoning administrator to a Board of Adjustment. Benton County Development Code 11.4.7. Minn. Stat. 394.27, Subd. 9 provides an appeal to the District Court from a determination by the Board of Adjustment. Consequently, any arbitrary or capricious decision by the zoning administrator in the issuance of a land use permit would be subject to appeal and review. The mere fact that the applicants must provided information to a zoning administrator does not render the ordinance impermissible, as long as a mechanism of review is available. *Mom N Pops , Inc. v. City of Charlotte*, 162 F. 3d 1155 (4th Cir. 1998) (unpublished); *Chesapeake B & M, Inc. v. Harford City.*, 58 F. 3d 1005 (4th Cir.) cert. denied, 516 U.S. 1010 (1995).

CONCLUSION

The County has identified 101 sites in unincorporated Benton Count. The court finds 100 of those sites to be reasonably available for location by an adult use facility. Plaintiff must comply with ordinary land use regulations, which apply to all commercial businesses. Any arbitrary or capricious position taken by the county is subject to administrative and

judicial review.

Benton County has provided reasonable alterative avenues of communication. Its adult use ordinance is constitutional and enforceable.

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STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BENTON SEVENTH JUDICIAL DITRICT

Kismet Investors, Inc., a Minnesota corporation,

Court File No. CO-98-1240

Plaintiff,

FINDINGS OF FACT, CONCLUSIONS OF LAW ORDER FOR PARTIAL SUMMARY JUDGMENT,

v.

County of Benton,

Defendant.

The above-entitled matter came before Honorable James W. Hoolihan, Judge of District Court, on the 9th day of June 1999.

Randall D.B. Tigue, Esq., appeared on behalf of the Plaintiff, Kismet Investors, Inc.

Kenneth H. Bayliss, Esq., appeared on behalf of Defendant, County of Benton.

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The Court denied the Plaintiff's zoning appeal in Count I of the Complaint in Findings of Fact, Conclusions of Law and an Order of Judgment dated April 2, 1999. The Defendant nowmoves the Court summary judgment against the Plaintiff, Kismet Investors, Inc. on Count II, III, and IV of the Plaintiff's Complaint. Count II of the Plaintiff's Complaint challenges the constitutional validity of

the County's zoning ordinance which regulates adult use facilities within Benton County. Count III challenges the reasonableness of Benton County Ordinance 242 in its amortization provision. Count IV contends that Benton County Ordinance 242 provides for an unconstitutional taking of Plaintiff's property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 13 of the Minnesota

Constitution. A50

The Plaintiff has brought a motion to amend the original Complaint in light of the passage of new amendments to Minn. Stat. §394.21, Subd. 1a and Minn. Stat. §462.357, Subd. 1c concerning zoning ordinances and prohibitions on amortization by counties and local municipalities.

Now, having duly considered the arguments of counsel, the documents and proceedings herein, together with the applicable law, this Court **ORDERS:**

The Defendant's motion for summary judgment on Count II of the Plaintiff's Complaint is **DENIED.** An evidentiary hearing shall be scheduled on the sole issue of whether Benton County has provided for reasonable alternative avenues of cmmunication for adult use Businesses.

The Defendant's motion for summary judgment on Count III of the Plaintiff's Complaint is **GRANTED.**

The Plaintiff's motion to amend the original Complaint in light of recently enacted Amendments to Minn. Stat. § 394.21 and Minn. Stat. § 462.357 is **DENIED.**

The attached memorandum constitutes the Findings of Fact, Conclusions of Law, Order and Judgment of the Court.

MEMORANDUM
Findings of Fact

Kismet Investors, Inc., the Plaintiff herein, is a 302A corporation incorporated in December of 1996 under Minnesota law. It has operated the business known as "King's on the Lake" in Benton County, Minnesota since January 2, 1997. The business features live, nude dance or cabaret entertainment and is currently doing business as "The King's Inn." The business itself has operated since September of 1993 under different ownership. At that time, Benton County, the Defendant herein, had a conditional use permit requirement for all recreational uses, which included adult use facilities. This previous ordinance was challenged by Plaintiff's predecessors in interest and was both temporarily and permanently enjoined by the United States District Court in the District of Minnesota. *See* Mga Susu, Inc. v. County of Benton, 853 F.Supp. 1147 (D.Minn. 1994) and Bukaka, Inc. v. County of Benton, 852 F. Supp. 807 (D. Minn.1993).

In June of 1993, Benton County was considering whether, and in what form to adopt a new adult use zoning ordinance. A scheduled discussion of the potential regulation of adult use businesses was planned and held on June 24, 1993 by the Benton County Planning and Zoning Commission (Commission). Assistant Benton County Attorney, Robert Raupp and Planning and Zoning Administrator, Lynn Machula presented information on the topic. Mr. Raupp distributed a one-page outline on various legal aspects of the regulation of adult use businesses. The outline indicated that any zoning restrictions by Benton County must be: 1) content-neutral; 2) time, place and manner restrictions; 3) designed to serve a substantial government interest; and 4) cannot unreasonably limit alternative avenues of communication. As part of the process of consideration of other ordinances and study of possible secondary negative effects of adult use businesses, a copy of the City of St. Cloud, Minnesota adult use ordinance was also distributed to the Commission. On July 22, 1993, Benton County identified adult use facilities as continued topic of discussion as it analyzed land use regulations and ordinances. No adult use facilities were operating in Benton County at this time. In September of 1993, the Plaintiff's predecessor in interest, Bukaka, Inc., began operation of an adult use business featuring nude dance entertainment at the property which is the subject of the instant case. A former ordinance in Benton County

required all adult use facilities to obtain conditional use permits. This ordinance was challenged and enjoined in Mga Susu, Inc. v. County of Benton, 853 F. Supp. 1147 (D. Minn. 1994) and Bukaka, Inc. v. County of Benton, 852 F.Supp. 807 (D. Minn. 1993).

On November 18, 1993, Benton County Planning and Zoning Commission continued discussion on adult use land regulations, specifically addressing information regarding concerns and activities of other municipalities and their adult use establishments. Benton County considered numerous other municipalities' studies of negative secondary effects of adult use businesses and was aware of valid land use regulations which had been passed based upon the secondary effects analysis. The Commission unanimously passes a resolution for the County Attorney's office to further research a possible adult use ordinance and submit potential ordinance language which was proper and enforceable.

On December 9, 1993, Mr. Raupp presented an update on the status of the investigation of studies and ordinances from other jurisdictions regarding adult use land regulations. Mr. Raupp reported that he had requested studies on adult use establishments for the Commission to consider for this type of land use activity. A neighborhood task force also presented concerns to the Commission regarding negative secondary effects of nude dancing establishments.

On December 28, 1993, Benton County published notice of its intent to amend the County Development Code

regarding adult use activities and to adopt an interim ordinance. The notice scheduled both a Commission meeting and a County Board meeting on the interim ordinance. As required under Minnesota law, Benton County published notice of open hearings on the interim ordinance for public attendance on January 13th and 18th of 1994.

On January 13, 1994, a public hearing was held by the Benton County Planning and Zoning Commission which considered and took public comment upon an interim ordinance regulating adult use facilities. The interim ordinance prevented the construction or operation of new adult use facilities. The interim ordinance prevented the construction or operation of new adult use facilities and had no impact on existing adult use facilities. Two citizens spoke in favor of the interim ordinance. No representative of the Plaintiff or Plaintiff's predecessor in interest attended the hearing. No person spoke against the interim ordinance.

On January 18, 1994, the Benton County Board of Commissioners held a meeting and adopted an interim ordinance (#236) to protect the planning process concerning adult use facilities. No person from the public spoke against the interim ordinance. Neither the Plaintiff, nor the Plaintiff's predecessor in interest spoke against the ordinance. The interim ordinance was scheduled to expire on July 31, 1994 due to time constraints imposed by the Minnesota Legislature.

On January 27, 1994, the Commission held a work session meeting to continue to examine the need

for adult use land regulations. The Commission considered court interpretations of the rights of freedom of expression under the First Amendment of the United States Constitution and negative effects of adult use facilities. The Commission looked at adult use ordinances from St. Cloud, Minnesota; Ramsey, Minnesota; Boston, Massachusetts; and Detroit, Michigan. The Commission also discussed the reasonable length of An amortization period based upon the recoupment of capital investment. On February 24, 1994, the Commission held a meeting and discussed issues regarding an adult use ordinance. The issues included: First Amendment protection of speech and expression, offering alternative avenues of communication for adult use facilities, setback distances from protected zoned area, property values and marketability, crime statistics, coordination with the Benton County Plan, and regulation of negative secondary effects as the focus of any regulation.

On March 24, 1994, the Commission held a work session which provided published notice and was open to the public. Discussed were property values histories in Anoka and Morrison Counties, Minnesota.

On May 26, 1994, the Commission held a publicly noticed meeting in which it Considered adopting a proposed resolution. The proposed resolution stated:

Whereas, the Benton County Planning Commission is concerned about the possible adverse secondary effects of Sexually Oriented Businesses on

adjacent properties, and;

Whereas, the Benton County Planning Commission, upon review of studies Conducted by the cities of Phoenix, Arizona; Indianapolis, Indiana and Austin, Texas is aware of an increase in overall crime rates in areas near Sexually Oriented Businesses, and;

Whereas, the Benton County Planning Commission wished to minimize the impact of traffic congestion, glare and noise generated by the normal operation of Sexually Oriented Businesses on adjacent properties, and;

Whereas, the Benton County Planning Commission seeks to minimize any potential negative impact on the value and marketability of land adjacent to Sexually Oriented Businesses, and;

Whereas, the Benton County Planning Commission *hopes* to provide space for location of Sexually Oriented Businesses in appropriately zoned districts in the County, (emphasis added) (Benton County Planning Commission, Minutes from Planning Session on May 26, 1994). The Planning Commission approved the proposed resolution with the only modification being replacement of the word "hopes' with the word "intends."

The Commission resolved that concerns existed regarding negative secondary effects

related to adult uses of property and that it wished to minimize the impact of traffic on the area, glare and noise from any adult use establishments and intended to protect property values and marketability from any potential negative secondary effects of adult use facilities. On June 23, 1994, the Commission held another publicly noticed open work session on a proposed adult use ordinance. It discussed specific language from the City of Ramsey in Anoka County, Minnesota, separate distances, amortization periods and enforcement of zoning ordinances.

On June 28, 1994, Benton County published notice of a final public hearing where both the Commission and the Benton County had an intent to amend the Benton County Development Code regarding adult use establishments in Benton County. The notice included Specific language of a proposed ordinance for consideration and request for public input.

On July 14, 1994, the Commission had its final meeting for consideration of the adult use Amendment. No one at the meeting spoke in opposition to the amendment. A motion to approve the amendment passes on a unanimous vote. Neither the Plaintiff not the Plaintiff's predecessor in interest attended this or any other Commission meeting concerning the regulation of adult use facilities.

On July 19, 1994, the Benton County Board held a publicly noticed and regularly scheduled meeting. Ms.

Machula presented proposed amendments to the County Development Code regarding adult use. The Board voted unanimously to adopt the amendments, which became Benton County Ordinance 242. The preamble of the ordinance states the Commission studied and reviewed various reports relating to the secondary effects of adult uses, including reports from St. Paul, MN; the Office of the Minnesota Attorney General; Indianapolis, IN; Rochester, MN; Los Angeles, CA; Phoenix, AR; Adams County, CO; Amarillo, TX; and Austin, TX. The preamble specifically noted the Amarillo, TX report which found increased traffic, noise and glare from adult uses and the St. Paul, Austin, Los Angeles and Indianapolis reports which found a potentially negative impact on property values adjacent to adult uses. The preamble expressly states an intent to allow adult uses in the County in appropriately zoned areas.

The adopted ordinance provides for an amortization period as expressed in Benton County Development Code 7.10.3. It states that nonconforming uses must cease at the end of Approximately found year: Adult uses established prior to the enactment of Benton County Ordinance 235 shall be permitted and regulated as nonconforming uses until July 31, 1998 at which time such uses shall become unlawful. The ordinance also provides a 500 foot setback requirement of adult use facilities from esidentially-zoned areas. Benton County Development Code, 7.10.2 states:

"No adult use shall be located within five hundred (500) feet of: Any area zoned R-1, R-2, or R-3." [residential areas].

"Adult use facilities are allowed to operated in B, B-2, I-1 and I-2 zones."

The Plaintiff purchased the business knows as The King's Inn in January of 1997 and subsequently purchased the real property, which is the subject of this action, one year later in 1998 for approximately $250,000 by contract for deed. At the time of the purchase of the real property by the Plaintiff, the Benton County Adult Used Ordinance #242 had been in istence for approximately 3 ½ years and compliance with the setback provisions of the ordinance required the adult used to cease within approximately six (6) months from the date of the real property purchase. Plaintiff's current business is lawfully in a B zoned area, however, it is within 500 feet of a residentially-zoned area and is located approximately 150 feet from the nearest residence. This makes the Plaintiff's business a nonconforming use and is the subject of the instant case. The amortization period of the ordinance allowed the Plaintiff to operated The King's Inn as an adult use business until July 31, 1998.

On July 22, 1998, Plaintiff applied for a variance from the Board to continue operations after the end for the amortization period. The application was received by the Board approximately nine (9) days prior to the

end of the amortization period. Hearings on the request for a variance were held by the Board on August 20, 1998 and September 17, 1998. The board members made a physical, on-site inspection of the property prior to the August 20, 1998 hearing.

On August 20, 1998, the Board held a public hearing for consideration of the Plaintiff's request. The Plaintiff presented information from a planning review performed by the Plaintiff's consultant, R. Bruce McLaughlin. Plaintiff presented information regarding the cost of improvements which were made to the property and claimed it would suffer hardship if the variance request was not granted. The Board decided to table the request to the next scheduled Board meeting, study and examine the information provided to it and schedule a second on-site inspection of the property.

The Board inspected the property a second time before the September 17, 1998 meeting to reconsider the application for a variance from the Plaintiff.

The Board met on September 17, 1998 to consider the variance application of the Plaintiff. A public hearing was again held and the hearing was recorded. The Board heard from several members of the public concerning the granting of the variance for continued operation of the adult business. At the conclusion of the meeting, the Board denied the requested variance and on October 15, 1998 issued written findings on the separate factors required for

granting the variance. The Board specifically found that the Plaintiff proposed to continue to operated an adult use facility after the conclusion of the amortization period. They also found:

(a) the proposed use is adult use, and is not prohibited in the business district in which it is located;

a) the variance would not be in harmony with the general purposes and intent of the Ordinance;

b) the Plaintiff had not demonstrated a hardship;

c) the concerns of the Plaintiff were solely economic;

d) the property could be put to an alternative reasonable use; the Plaintiff failed to demonstrated a plight that is due to circumstances unique to the property;

e) the Plaintiff purchased the property with constructive knowledge of the Ordinance;

f) the variance, if granted, would alter the family neighborhood character of the locality.

The Plaintiff subsequently brought a four (4) count complaint against the Defendant. The parties agreed to bifurcate the issues and have the Court address the first count which challenged the validity of the Benton County Board of Adjustment's denial of the variance request.

In Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, this Court affirmed the Board's

denial of the variance request as a valid exercise of its power and denied Plaintiff's requested relief for a temporary restraining order and a temporary injunction against enforcement of Benton County Development Code, Ordinance #242. *See* Kismet Investors, Inc. v. County of Benton, File No. 05-C5-98-001240, Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, dated April 2, 1999.

The Defendant now moves the Court for an order directing the entry of summary Judgment in its favor and against the Plaintiff, Kismet Investor, Inc., in accordance with Rule 56 of the Minnesota Rules of Civil Procedure on Counts II, III, and IV of the Plaintiff's Complaint.

DISCUSSION AND CONCLUSIONS OF LAW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. The party moving for summary judgment must demonstrate that no genuine issue of material fact exists. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).

The evidence must be viewed in the light most favorable to the non-moving party. *Offerdahl v. University of Minnesota*, 426 N.W. 2d 425, 427 (Minn. 1988). The non-moving party may not rest on mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. See Minn. R. Civ. Proc. 56.05. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient, there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). After the moving party makes out a prima facie case, the non-moving party must come forward with facts that raise a genuine issue for trial. *Thiele*, 425 N.>W. 2d at 583 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The court does niot resolve or decide issues of fact, but only determines whether there are issues of material fact to be tried. Nord v. Herreid, 305 N.W. 2d 337, 339 (Minn. 1981). If a plaintiff cannot support each essential element of his or her claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. See *Nicolle Restoration, Inc v. City of St. Paul*, 533 N.W. 2d 845, 848 (Minn. 1995) (citing *Celotex*, 477 U.S. at 322-23). Summary judgment should not be granted if reasonable persons, after reviewing the evidence, might reach different conclusions. *Jonathan v. Kvaal*, 403 N.W. 2d 256, 259 (Minn. Ct. App. 1989). Speculation or general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial. *Bob Useldinger & Sons, Imc. v. Hangsleben*, 505 N.W. 2d 323, 328 (Minn. 1993) (speculation); *Erickson v. General United Life Ins. Co.* 256 N.W. 2d 255, 259 (Minn. 1977) (general assertions).

I. Constitutionality of Benton County Adult use Ordinance.

In Minnesota, the constitutionality of municipal ordinances is presumed, including adult use ordinances, and the burden of proving otherwise rests on the party attacking its validity. *City of Ramsey v. Holmberg,* 548 N.W. 2d 302, 305 (Minn. Ct. App. 1996) (citing *City of St.Paul v. Dalsin*, 245 minn. 325, 329, 71 N.W. 2d 855, 858 (1955)). Establishments which offer nude dancing or nude cabaret may be entitled to First Amendment protection as a form of expression. See *Koppinger v. City of Fairmont,* 311 Minn. 186, 248 N.W. 2d 708, 715 (Minn. 1976); *California v. LaRue* 409 U.S. 109, 118, 93 S. Ct. 390, 397, 34 L. Ed. 2d 342 (1972). In order to survive First Amendment scrutiny, such regulations must be content-neutral, "designed to serve a substantial governmental interest" and cannot unreasonably limit alternative avenues of communication. *City of Ramsey,* 548 N.W. 2d at 305 (quoting *Renton*, 475 U.S. at 46, 106 S. Ct. at 928). Where an ordinance does not ban adult uses completely, but merely limits the areas in which they may operate, it is properly analyzed as a time, place and manner regulation. *City of Ramsey,* 548 N.W. 2d at 305. See *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46,106 S. Ct. 925, 928, 89 L. Ed. 2d 29 (1986).

Since Benton County Ordinance No. 242 does not ban adult use facilities in the County completely and attempts to limit the areas in which they may operate, the regulation is a time, place and manner regulation and is controlled by and properly analyzed under the test in *City of Renton v. Playtime Theaters.*

In applying the *Renton* rest, the first task is to determine whether the ordinance is "content-neutral." *ILQ Investments, Inc. v. City of Rochester*, 25 F. 3d 1413, 1416 (8th Cir. 1994). The term "content-neutral" is a term of art.

The fundamental principle that underlies the Court's concern with "content-based" speech regulations is that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *City of Renton*, 475 U.S. at 48-49. (Quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 S. Ct. 2286, 2289-90, 33 L. Ed. 2d 212 (1972)). "A regulation the serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989). Local governments may restrict adult businesses in order to curb their unwanted "secondary effects." *City of Ramsey v. Holmberg*, 548 N.W. 2d 302, 360 (Minn. Ct. App. 1996) (citing *City of Renton* at 49, 106 S. Ct. at 929-30. If the county's ordinance serves a purpose unrelated to the expressive content of the sexually-oriented businesses the county wants to regulate, the ordinance is deemed neutral, even though the ordinance may affect those businesses incidentally. *Holmberg v. City of Ramsey*, 12 F. 3d at 143 (citing *Ward*, 491 U.S. at 791, 109 S. Ct. at 2453). The county may draw distinctions between entertainment establishments and adult entertainment establishments "without violating the government's paramount obligation of neutrality in its regulation of protected communication." See *City of Renton*, 475 U.S. at 49, 106 S. Ct. at 930 (quoting *Young v. American Mini-theaters, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976). The Supreme Court noted in *American Mini-Theaters*, that "[i]t is the [e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." Id (quoting *American Mini-Theaters* at 71, n. 34, 96 S. Ct. at 2453, n. 34). In *ILQ*, the Eighth Circuit has stated:

> ...even if a time, place and manner ordinances regulates only businesses selling sexually explicitly materials,

the ordinance is content-neutral if its purpose is to lessen undesirable secondary effects attributable to those businesses, such as increased crime, lower property values, or deteriorating residential neighborhoods.

ILQ Investments, 25 F. 3d at 1416. See *Holmberg*, 12 F. 3d at 143; *Doe v. City of Minneapolis*, 898 F. 2d 612, 617 (8th Cir. 1990).

In the above-entitled matter, Benton County sought to regulate adult use facilities without reference to the content of the regulated speech (nude dance entertainment). The ordinance seeks to limit the locations of sexually-oriented adult use businesses from within 500 feet of protected areas. Benton County Development Code 7.10.2 expressly state that: "(A) Adult Uses shall be permitted in areas zoned B, B-2, I-1 and I-2..." (Emphasis added). The ordinance by its terms is designed to lessen the adverse secondary effects of sexually -oriented businesses, i.e. adult uses. Such adverse secondary effects which the commission found, based upon review and study of various reports were increased rates of crime resulting from adult use businesses; negative impact on surrounding neighborhoods; greater perpetration of crime on children and other vulnerable persons; traffic; glare and noise from adult use businesses; and the negative impact on the value and marketability of adjacent properties. The ordinance was not designed to suppress the expression of unpopular or offensive communication or conduct.

Therefore, Benton County Ordinance 242 does not involve an impermissible time, place and manner restriction based on the content of expression. It is "content-neutral: in its purpose to lessen unwanted negative secondary effects attributable to adult uses businesses such as increased crime, lessened quality of life for nearby residential neighborhoods and possible lower property values and marketability in the surrounding area. The ordinance survives attack on the first test from *City of Renton*, as it is a content-neutral ordinance.

The second pat of the test in Renton is to determine whether the regulation serves a substantial government interest. Regulations reasonably designed to curb unwanted secondary effects of sexually oriented businesses serve a substantial governmental interest. *ILQ Investments*, 25 F. 3d at 140, 143 (8th Cir. 1993). In order for Benton County to prove that its ordinance is narrowly tailored to the government interest, it must prove that adult uses cause negative secondary effects. See *City of Crystal v. Fantasy House, Inc.*, 569 NW. 2f 225, 229 (Minn. Ct. App. 1997). In determining whether the secondary effects of adult businesses justify regulation, a city is not required to conduct its own study, but may rely on the studies and experiences of other cities, "so long as whatever evidence the [county] relies upon is reasonably believe to be relevant to the problem that the [county] addresses." *City of Ramsey*, 548 N.W. 2d at 306 (quoting *City of Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931) (emphasis added).

The Plaintiff argues that Benton County relied upon studies which "were drafted with preconceived notion[s] of coming up with evidence to justify restrictions upon adult entertainment," that such secondary effects were unlikely to occur in rural Benton County and that little too adverse secondary effects have occurred in connection to the plaintiff's business.

As the courts have addressed numerous times in *ILQ Investments, Inc. v. City of Crystal, City of Ramsey* and *City of Renton*, "that is simply not the law." *ILQ Investments, Inc.*, 25 F. 3d at 1418. "[T]he requirement of narrow tailoring is satisfied 'so long as the ...regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id (citing *Ward*, 491 U.S. at 799, 109 S. Ct. at 2758 (quoting *United States v. Albertini*, 482 U.S. 675, 689, 105 S. Ct.2897, 2906, 86 L. Ed. 2d 536 (1985))). A county only needs to prove that the ordinance targets businesses, "reasonably believed to produce

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at least some of the unwanted secondary effects..." *City of Crystal*, 569 N.W. 2d at 230 (quoting *ILQ Investments, Inc.*, 25 F. 3d at 1418).

Under *Renton*, Benton County does not need to prove that the King's Inn would have the same negative secondary effects on its surroundings as other adult use businesses studies in St. Paul, MN; the Office of the Minnesota Attorney General; Indianapolis, IN; Rochester, MN; Los Angeles, CA; Phoenix, AR; Adams County, CO; Amarillo, TX; and Austin, TX. It is enough that Benton County Ordinance 242 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects. As stated in *City of Renton*, "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931 (quoting *American Mini-Theaters*, 427 U.S. at 71, 96 S. Ct. at 2453, 49 L. Ed. 2d 310) (plurality opinion). Therefore, as stated in *City of Crystal*, the question becomes: did Benton County reasonably believe that the studies relied upon were relevant to restricting adult use facilities?

Benton County relied upon numerous studies which viewed adult use and sexually-oriented businesses, both within Minnesota and outside of it and in both rural and urban settings. Those studies identified specific adverse secondary effects attributable to adult use businesses and it is reasonable for Benton County to have relied upon them in establishing their ordinance. The studies examined reasonably similar businesses which provided the commission and the Benton County Board sufficient information to enact the ordinance. This satisfies the second part of the *Renton* test. Any businesses effected by the ordinance are those the county reasonably believe cause adverse secondary effects.

The plaintiff argues that the studies were flawed and has resented evidence and affidavits to show that the studies liking adverse secondary effects to the King's Inn specifically are not credible.

The law is whether Benton County reasonable believe the studies were relevant to the problems addressed by the ordinance at the time it enacted the ordinance. The county enacted the ordinance on the strength of thorough research, documented studies, public hearings and considered deliberations. As the new studies and evidence were not before the commission or the Benton County Board at the time of the enactment of the ordinance, they were not part of the commissioners or the Board members deliberations. When the county passed the ordinance, it had evidence before it that adult use businesses like the plaintiff's produced unwanted negative secondary effects in the surrounding community. The plaintiffs argument fails to raise a genuine issue of fact as to whether Benton County reasonably believed that the businesses to which the ordinance applies produce at least some of the negative secondary effect shown in the studies which were considered. See *City of Ramsey v. Holmberg*, 548 N.W. 2d 302, 306 (Minn. Ct. App. 1996).

The third part of the *Renton* test is to determine whether Benton County ordinance, which restricts free speech in order to control the negative secondary effects of adult use businesses, provides reasonable alternative avenues of communication for the exercise of that First Amendment right.

In making this determination, the First Amendment requires Benton County to refrain from effectively denying the plaintiff a reasonable opportunity to operate or open an adult use facility within the county. See *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932. The Supreme Court has stated this does not means "that the First Amendment compels the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to ontsin sites at bargain prices." *American Mini-Theaters, Inc.*, 427 U.S. at 71, n. 35, 96 S. Ct. at 2453, n. 35 (plurality opinion).

In the above-entitled action, the Defendants assert

that there are over 2400 acres available for commercial and industrial uses in Benton County. Of these, they claim that there are dozens of commercial and industrial sites within the county where a locating adult use business would not run afoul of setbacks. The Plaintiff asserts that virtually all of the industrial zones available for adult uses could be eliminated since generic commercial uses are excluded from the entire industrial zone. It also asserts that virtually all of the available land is unplatted and rural in nature. This could allow the Defendants to indefinitely delay acting to permit a subdivision and grants the county unfettered discretion in placing conditions upon the approval of subdivision development.

In light of the parties' assertions regarding land availability, a genuine issue of material fact exists as to whether reasonable alternative avenues of communication are provided for adult use businesses. This precludes the court from granting summary judgment to Defendant and requires that an evidentiary hearing be held to make a determination on the issue.

In summary, Benton County ordinance No. 242 is content-neutral and is narrowly tailored to serve a substantial governmental interest. A fact issue exists as to whether the ordinance provides reasonable alternative avenues of communication for adult use facilities.

II Amortization Period Reasonableness

As stated, Benton County ordinance provides a four (4) years amortization period for nonconforming adult uses to comply with the zoning ordinance. Benton County Code 7.10.3 states:

Adult uses established prior to the enactment of Benton County Ordinance No. 235 shall be permitted and regulated as nonconforming uses until July 31, 1998, at which

time such uses shall become unlawful, unless they conform to the requirements of Sec. 7.10.22.

Minn. Stat. Sec. 394.21 grants counties the authority to carry on their planning and zoning activities. The statute states: "Except most populous counties. For the purpose of promoting the health, safety, morals and general welfare of the community any county in the state having less than 300,000 population according to the 1950 federal census is authorized to carry on county planning and zoning activities." Minn. Stat. Sec. 394.21, Subd. 1 998). Minn. Stat. Sec. 394.36 provides counties with the power to regulate nonconforming uses. It states:

Nonconformities.
Subdivision 1. Continuous or it ends. Any nonconformity including the lawful use or occupation of land or premises existing at the time of the adoption of an official control hereunder may be continued, except as regulated, terminated or acquired by the board as provided in subdivision 2 or 3...

Subd. 2. Regulation. The board may by ordinance adopt such regulations not contrary to law as it deems desirable or necessary to classify, regulate and control, reduce the number or extent of and provide for the gradual elimination of Nonconformities and occupancies, including requiring Nonconformities to conform with the official controls of the county or terminate within a reasonable time as specified in the official controls...(emphasis added).

Amortization periods have been upheld by both state and deferral courts as long as they are reasonable. See *Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W. 2d 206 (Minn. 1968); *Alexander v. City of Minneapolis*, 928 F. 2d 278 (8th Cir. 1991); *Holmberg v. City of Ramsey*, 12 F. 3d 140 (8th Cir.

1993). In *Naegele,* the Minnesota Supreme Court noted:

> "In order to make this power to create exclusively residential districts effective, municipalities must have the power to prohibit the construction of future nonconforming uses and to require the removal of old ones. The continued presence of preexisting nonconforming commercial uses within these residential districts may reasonably be found to vitiate the effectiveness of the entire comprehensive municipal plan...The legislature, in giving municipalities broad land-use-planning powers, could not have intended to render them ineffective by denying the municipalities the power to eliminate preexisting nonconforming uses. Thus, even though the enabling nonconforming uses, such a power is necessarily implied from the broad grant of power to establish and implement a comprehensive municipal plan.

Naegele Outdoor Advertising, 281 Minn. at 504, 162 N.W. 2d at 215.

In Minnesota, amortization periods of two (2) and three (3) years have been upheld. See *Naegele Outdoor Advertising,* 281 Minn. 492, 162 N.W. 2d 206 (Minn. 1968) (three year amortization period reasonable) and *AVR, Inc. v. City of St. Louis Park,* 585 N.W. 2d 411 (Minn. Ct. App. 1998) (two year amortization period reasonable).

In light of the foregoing, the four (4) year amortization period enacted by the Benton County Planning and Zoning Commission and Benton County Board is reasonable and constitutional as authorized under Minnesota state law.

The plaintiff has subsequently moved the county for

amend its complaint to assert a claim under the newly adopted Minnesota law which prohibits amortization ordinances from being adopted or enforced by counties or municipalities within the state. Minn. Stat. Sec. 394.21 was amended by adding a subdivision to read:

> Subd. 1a. Amortization Prohibited. Except as otherwise provided in this subdivision, a county, regardless of population, under this chapter or under a special or local law, must not enact, amend, or enforce an ordinance proving for the elimination or termination of a use by amortization which use was lawful at the time of its inception. This subdivision does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance (emphasis added).

Minn. Stat. Sec. 394.21, Subd. 1a (1999).

The statute was recently enacted and signed into law on April 23, 1999 and provides clear and unambiguous language which excepts adult use businesses from the prohibited amortization. In light of the fact that the language states that adult-only businesses are those defined by ordinance and the Plaintiff has stipulated that the King's Inn is an adult use businesses under the definition of the ordinance, the Plaintiff's business is an exception to the recently amended statute. Therefore, the Plaintiff's motion to amend its complaint to assert a claim under the amended statute is denied.

III. Taking

The plaintiff concedes in its argument that under *Myron v. City of Plymouth*, 562 N.W. 2d 21 (Minn.Ct. App.

1997) (*aff'd without opinion*, 581 N,W. 2d 815 (Minn. 1998), one who purchases property subject to zoning restrictions cannot argue that the pre-existing regulations constitute a constitutional taking. It does asset that under the Minnesota Constitution, private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured (emphasis added). MINN CONST., Art I, Sec. 13. The Plaintiff claims its property has been damaged because its value as an adult use facility has been diminished considerably by the zoning ordinance and setback requirement. Plaintiff contends the building is "useless" for any other purpose than nude dance entertainment without large expenditures.

It would be inconsistent to interpret the takings clause of the Minnesota Constitution to allow relief to one for damage to property where they purchased said property with knowledge that it is encumbered by zoning regulations and not to allow compensation for the taking of that same property which is equally so encumbered. In order to establish an unconstitutional taking a landowner must demonstrate he has been deprived, through governmental action or inaction, of all the reasonable uses of its land. *Heller v. Wolner*, 269 N.W. 2d 31 (Minn. 1978); *Czech v. City of Blaine*, 253 N.W. 3d 272 (Min. 1977).

The simple assertion that Plaintiff's building is more valuable as a nude dance establishment facility than any other use has been determined to be without merit. "[I]t is too fundamental for citation or authorities that rezoning, which is otherwise valid, does not give rise to an action for damages because the land in question may be more valuable for some other purpose." *Holeway v. City of Pipestone*, 269 N.W. 2d 28, 30 (Minn. 1978) (quoting *Almquist v. Town of Marshan*, 308 Minn. 52, 69, 245 N.W. 2d 819, 828 (Minn. 1976).

Therefore, the Plaintiffs claim for an unconstitutional taking or damaging of property is rejected by the court under

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the United States and the Minnesota Constitution. As stated in *Myron* and applied to this case, "[plaintiff] knew [it] was taking a "gamble" when [it] purchased the property. The price presumably reflected the zoning restriction, and [plaintiff] therefore, may not now claim that the [County] has taken property rights from [it] without just compensation." *Myron v. City of Plymouth,* 562 N.W. 2d 21, 24 (Minn. Ct. App. 1997).

Order for Judgment

The Defendant's motion for summary judgment on Count II of the Plaintiff's complaint is **DENIED**. An evidentiary hearing will be scheduled on the sole issue of whether Benton County has provided for reasonable alternative avenues of communication for adult use businesses. The Defendant's motion for summary judgment on Count III of the Plaintiff's complaint is **GRANTED.**

The Defendant's motion for summary judgment on Count IV of the Plaintiff's complaint is **GRANTED.**

The Plaintiff's motion to amend the original complaint in light of recently enacted amendments to Minn. Stat. Sec. 394.21 and Minn. Stat. Sec. 462.357 is **DENIED.**

Dated this 7th day of July, 1999

/s/
James W. Hoolihan
District Judge

Let Judgment be Entered Accordingly,

I hereby certify that the foregoing constitutes the judgment of this court.

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Dated: 7/1/99 A.83

TIMOTHY R. ROBERTS.
Court Administrator.

/s/
Deputy Court Administrator

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STATE OF MINNESOTA
COUNTY OF BENTON

BENTON COUNTY
BOARD OF ADJUSTMENT

In the matter of the Variance Request of:

KISMET INVESTORS, INC. File No. 9800403

WHEREAS, Kismet Investors, Inc, d/b/a King's Inn, applied for a variance from Sec. 7.10.3(A) of the Benton County Development Code; and

WHEREAS, public hearings regarding said application were held on August 20th and September 17, 1998; and

WHEREAS, upon consideration of all the evidence, documents and testimony presented herein, the Board of Adjustments makes the following:

FINDINGS

1. That the proposed use is an adult use, and is not prohibited in the business district in which it is located.

2. That the requested variance would not be in harmony with the general purposes and intent of the Benton County

Development Code, which provides for the gradual elimination of nonconforming uses and structures.

3. That the applicant has not demonstrated a hardship within the meaning of the Benton County Development Code and Minn. Stat. Sec. 394.27.

4. That the concerns expressed by the applicant are solely economic in nature.

5. That the property in question could be put to the reasonable use if used under the conditions allowed by the Development Code. The property and existing building have, prior to the applicant's purchase, been used as a restaurant and resort, and could be used in a similar manner again.

6. That the applicant has failed to demonstrate a plight that is due to circumstances unique to the property.

7.. That the applicant purchased the property after the adult use provisions of the Benton County Development Code were enacted and, therefore, had constructive knowledge of those provisions when the property was purchased.

8. That the variance , if granted, would alter the family neighborhood character of the locality.

Based upon the foregoing, the Board of Adjustments finds that the applicant has failed to demonstrate that it qualifies for a variance pursuant to M.S. Sec. 394.27 and Sec. 11.5.1 of the Benton County Development Code, and the applicant's variance request is hereby DENIED.

/s/_____
Bruce Binnie, Chair

Subscribed and sworn
to before me this 15th
day of Oct., 1998.

/s/_____
Notary Public

ADULT USE ORDINANCE
Benton County, Minnesota
Ordinance #_____

WHEREAS, the Benton County Planning Commission is concerned about the possible adverse secondary effects of sexually oriented businesses on adjacent properties; and,

WHEREAS, the Benton County Planning Commission has reviewed and studied the following reports relating to Sexually Oriented Businesses, also referred to herein as Adults Uses:

Adult Entertainment , a 40-Acre Study, St. Paul, Mn, Department of Planning and Economic Development (1987, Supplemented 1988); Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses, Attorney General, State of Minnesota (1989); Adult Entertainment Businesses in Indianapolis, Indiana (1984); Adult Entertainment Perspectives, Rochester/Olmsted, MN, Consolidated Planning Department (1988); Study of the Effects of the Concentration of Adult Business Study, Planning Department, City of Phoenix, AZ (1979); Adams County, Colorado, Nude Entertainment Study, (1991); A. Report on Zoning and Other Methods of Regulating Adult Entertainment Uses in Amarillo, TX; Report on Adult Oriented Business in Austin, TX; (1986), all of which are hereafter collectively referred to as "Reports"' and,

WHEREAS, the Planning Commission finds, based upon the Reports, that Sexually Oriented Businesses have an impact on the neighborhoods surrounding them which is distinct from the impact caused by other commercial uses; and

WHEREAS, the Benton County Planning Commission finds, based upon the Reports completed by the cities of Phoenix, Indianapolis, and Austin, that the rate of overall crime is greater in areas near Sexually Oriented Businesses; and

WHEREAS, because of the increased potential for criminal behavior in areas near sexually oriented business, the Planning Commission seeks to separate such businesses from areas in which children and other persons who are particularly vulnerable to crime may be expected to frequent; and

WHEREAS, the Benton County Planning Commission, after review of the report completed for the city of Amarillo, TX, finds that sexually oriented businesses can result in traffic, glare and noise, in excess of that created by other businesses by virtue of their hours of operation; and

WHEREAS, the Benton County Planning Commission wishes to minimize the negative impact of traffic, glare and noise

on adjacent properties; and

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WHEREAS, the Planning Commission finds, based upon the Reports completed for the cities of St. Paul, Austin, Los Angeles, and Indianapolis, that sexually oriented businesses have potentially negative impact on the value and marketability of properties adjacent to those businesses; and

WHEREAS, the Benton County Planning Commission seeks to minimize any potential negative impact on the value of land adjacent to sexually oriented businesses; and

WHEREAS, the Reports conclude the adverse impacts which sexually oriented businesses have on surrounding areas diminish as the distance from the sexually oriented businesses increases; and

WHEREAS, the Benton County Planning Commission intends to provide space for location of sexually oriented businesses in appropriately zoned districts in the county; and

WHEREAS, on June 28, 1994, a notice of public heating and intent to amend development code was published in the

newspaper and mailed to the governing bodies of all towns and municipalities located within Benton County; and

WHEREAS, on July 14, 1994, the Planning Commission held a public hearing thereon and recommended that the following amendment be enacted; now

THEREFORE, BE IT RESOLVED that the Benton County Planning Commission recommends that the following test be added as Sec. 7.10 of the Benton County Development Code, Ordinance No. 185:

ADULT USES

7.10.1 For the purposes of this section, the following definitions shall apply:

Adult uses: Adult uses include adult bookstores, adult motion picture theaters, adult mini-motion picture theaters, adult massage parlors, adult steam room/bathhouse facilities, adult enterprises, businesses or places open to some or all members of the public at or in which there is an emphasis on the presentation, display, depiction or description of "specified sexual activities" or "specified anatomical areas" which are capable of being seen by members of the public.

Adult bookstore: a building or portion of a building used for the barter, rental or sale of items consisting of printed matter, pictures, slides, records, audiotape, videotape, or motion picture film if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities' or "specified anatomical areas" or the barter, rental or sale or instruments, devices, or paraphernalia that are designed for use in connection with specified sexual activities, "substantial or significant portion of items," for

purposes of this ordinance, shall mean more than fifteen (15) percent of usable floor area.

Adult cabaret: A building or portion of a building used for providing dancing or other live entertainment, if such building or portion of a building excludes minors by virtue of age, or if such dancing or other live entertainment is distinguished or characterized by an emphasis on the presentation, display, depiction or description of "specified sexual activities" or "specified anatomical areas."

Adult conversation/rap parlor: A conversation/rap parlor which excludes minors by reason of age, or which provides the service of engaging in or listening to conversation, talk, or discussion, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

Adult health/sports club: A health/sports club which excludes minors by reason of age, or if such club is distinguished or characterized by an emphasis on "specified sexual activities' or "specified anatomical areas"

Adult massage parlor: A massage parlor which restricts minors by reason of age, or which provides the service of "massage" if such service if distinguished or characterized by an emphasis on " "specified sexual activities' or "specified anatomical areas"

Adult mini-motion picture theater: A building or portion of a building with a capacity for less than fifty (50) person used for presenting material if such building or portion of a building as a prevailing practice excludes minors by virtue of age, or if such materials is distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities' or "specified anatomical areas" for observation by patrons therein.

Adult motion picture theater: A building or portion of a building with a capacity of fifty (50) or more persons used for presenting material if such building or portion of a building as a prevailing practice excludes minors by virtue of age, or if such material is distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

Adult steam room/bathhouse facility: a Building or portion of a building used for providing a steam bath or heat bathing room used for the purpose of pleasure, bathing, relaxation, or reducing, utilizing steam or hot air as a cleaning, relaxing or reducing agent, if such building or portion of a building restricts minors be reason of age or if the service provided by the steam room/bathhouse facility is distinguished or characterized by an emphasis on"specified sexual activities" or "specified anatomical areas."

Specified anatomical areas:

(1) Less than completely and opaquely covered:

a. Human genitals;

b. Pubic region;

c. Buttocks; and

d. Female breast below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Specified sexual activities:

(1) Human genitals in a state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse or sodomy; and

(3) Fondling or other erotic touching of human genitals, pubic region, buttocks or female breast.

7.10.2 LOCATION REQUIREMENTS

(A) Adult uses shall be permitted in areas zoned B, B-2, I-1, and 1-2, provided the following requirements are met:

No adult shall be located within five hundred (500) feet of:

1. Any area zoned R-1, R-2 or R-3.

2. Any school, as defined in Minn. Stat. Sec. 120.101.

3. Any church, as defined in the Benton County Development Code.

4. Any daycare facility, as defined in the Benton County

Development Code, or any residential or nonresidential program, as defined in Minn. Stat. Sec. 245A.02.

5. Any hotel or motel.
6. Any public park.

(B) Adult uses shall not be established or maintained as a permitted, conditional or accessory use in any area other than those described in paragraph (A) above.

7.10.3 AMORTIZATION OF NONCONFORMING USES

Adult uses established prior to the enactment of Benton County Ordinance 235 shall be permitted and regulated as nonconforming uses until July 31, 1998 at which time such uses shall become unlawful.

7.10.4 ADDITIONAL BUILDING PLACEMENT RESTRICTIONS.

Chapter 7.10, the Adult Use Regulations of the Benton County Development Code, contains standards that are additional to those set forth in other sections of the code. Minimum setbacks from roads, building bulk limitations, as well as minimum lot and building dimensions, shall be determined by referring to the specific standards set forth in the underlying zoning district (e.g., I-1,I-2, B, B-2). In the event of a conflict between the setbacks listed in this chapter and those listed in the other appropriate sections of the Development Code, the most restrictive setback shall apply.

BE IT FURTHER RESOLVED that Section 7.0.1 of the Code be amended to reflect the addition of this chapter.

BE IT FURTHER RESOLVED that the Benton County Ordinance Number 236 be repealed upon the lawful enactment and publication of this ordinance.

4.1.1 Any nonconforming use or nonconforming structure existing on March 28, 1979, other than a use specified in Sec. 4.2.3. may continue until its normal expiration.

(1) No nonconforming use or nonconforming structure shall be extended, expanded, enlarged or increased in intensity, except a nonconforming structure meeting the requirements of paragraph (7) or of Section 6.4.1.

(2) If a nonconforming use is discontinued for a period of more than one year, further use of the structure or property shall conform to this ordinance. The county assessor shall notify the zoning administrator or Planning Commission in writing of all instances of nonconforming uses which has been discontinued for a period of twelve consecutive months.

(3) If a nonconforming structure is destroyed by fire or other peril to the extent of 50 percent of its market value as indicated by the records of the county assessor, any subsequent use of the land or premises shall be a conforming use. Any subsequently erected structure shall be a conforming structure.

(4) If a nonconforming structure is intentionally destroyed to any extent, any subsequent use of the land or premises must be a conforming use. Any subsequently erected structure shall be a conforming structure.

(5) Cement slabs, foundations and equipment, which are not

used to compare the cost of land use permits, shall not be used as part of the market value for the purposes of paragraph 3 and 4. Any figure of the county assessor which takes into account these items shall, accordingly be adjusted.

(6) Normal maintenance of a building or other structure containing or related to a lawful nonconforming use, or which is a nonconforming structure, is permitted, including necessary non-structural repairs and incidental alterations which do not extend the life of the nonconforming use, intensify the nonconforming use, extend the life of the nonconforming structure, or expand the nonconforming structure.

(7) Notwithstanding paragraph (1) of this section, any otherwise lawful structure which is rendered nonconforming solely by reason of expansion of a public road right of way through eminent domain, purchase or other permanent governmental action may be extended, expanded, enlarged, or structurally altered; provided, that any extensions, expansion or alteration shall not encroach upon the public road right of way to any greater extent than the existing structure and must comply with all other applicable setback restrictions and requirements of this ordinance.

4.2.2 any structure which will, under this ordinance become nonconforming, but for which a land use permit has been lawfully granted prior to March 28, 1979 shall be considered a nonconforming structure.

4.2.3. No junkyard or auto reduction yard shall continue as a nonconforming use after October 12, 1984, but it may continue as a conditional use in a business, industrial, or agricultural district if, prior to October 13, 1984, the land owner applied and obtained a conditional use permit to continue said operation.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BENTON SEVENTH JUDICIAL DISTRICT
Case Type: other civil

Kismet Investors, Inc., a
Minnesota corporation,

Plaintiff,

COMPLAINT

vs.

County of Benton,

Defendant.

The above-named Plaintiff, for its Complaint against Defendant, hereby alleges the following:

PARTIES

1. Plaintiff Kismet Investors, Inc. is a corporation organized under the laws of the State of Minnesota. It currently does business as "King's on the Lake," a business located outside the city limits of Rice, Minnesota, an unincorporated Benton County.

2. Defendant County of Benton is a county

organized under the laws of the State of Minnesota.

FACTUAL BACKGROUND

3. Since January 2, 1997, Plaintiff has operated the business known as "King's on the Lake" in unincorporated Benton County, Minnesota. Plaintiff is the contract purchaser of the real estate of which said business is located.

4. "King's on the Lake" is a business featuring non-obscene nude dance entertainment. As such, the business engaged in is presumptively entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution.

5. On July 19, 1994, Defendant County of Benton adopted ordinance No. 242, a copy of which is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein.

6. In enacting said ordinance, and in enforcing said ordinance, Defendant County of Benton acted under color of

state law, statute, ordinance, regulation, custom or usage, within the meaning of Title 42 U.S.C. Sec. 1983.

7. Said ordinance purports to regulate the location of "adult uses," defined in Sec. 7.10.1 of the ordinance as follows:

> "Adult uses include adult bookstores, adult motion picture theaters, adult mini-motion picture theaters, adult massage parlors, adult steam rooms/bathhouse facilities, adult enterprises, businesses or places open to some or all members of the public at which there is an emphasis on the presentation, display, depiction or description of 'specified sexual activities' or 'specified anatomical areas' which are capable of being seen by members of the public."

The term "specified anatomical areas" is defined in the ordinance as follows:

(1) less than completely and opaquely covered;

a. Human genitals;
b. Pubic region;
c. Buttocks; and
d. Female breasts below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid

state, even if completely and opaquely covered."

8. "King's on the Lake" is an "Adult use" within the meaning of the ordinance.

9. Under the locational requirements contained in Sec. 7.10.2(A), adult uses are permitted only in areas zoned B, B-2, I-1, and I-2 provided that said adult uses are not located within 500 feet of any residentially zoned property, school, church, day care facility, hotel or motel, or public park.

11. Were Plaintiff's establishment any other use other than an adult use, it would be permitted to remain in its current location as a lawful non-conforming use, pursuant to Sec. 4.2 of the Benton County Development Code, a copy of which is attached hereto as Exhibit B, which provides in pertinent part, as follows:

> "4.2.1 Any nonconforming use or nonconforming structure existing on March 28, 1979, other than a use specified in Section 4.2.3, may continue until its normal expiration.
>
> (1) No nonconforming use or nonconforming structure shall

be extended, expanded, enlarged or increased in intensity, except a nonconforming structure meeting the requirements of paragraph (7) or of Section 6.4.1.

(2) If a nonconforming use is discontinued for a period of more than one year, further use of the structure or property shall conform to this ordinance. The County Assessor shall notify the Zoning Administrator or Planning Commission in writing of all instances of nonconforming uses which have been discontinued for a period of twelve consecutive months.

(3) If a nonconforming structure is destroyed by fire or other peril to the extent of 50 percent of its market value as indicated by the records of the County Assessor, any subsequent use of the land or premises shall be a conforming use. Any subsequently erected structure shall be a conforming structure.

(4) If a nonconforming structure is intentionally

destroyed to any extent, any subsequent use of the land or premises must be a conforming use. Any subsequently erected structure shall be a conforming structure.

(5) Cement slabs, foundations and equipment, which are not used to compute the cost of land use permits, shall not be used as part of the market value for the purposes of paragraphs 3 and 4. Any figure of the County Assessor which takes into account these items shall, accordingly, be adjusted.

(6) Normal maintenance of a building or other structure containing or related to a lawful nonconforming use, or which is a nonconforming structure, is permitted, including necessary non-structural repairs and incidental alterations which do not extend the life of the nonconforming use, intensify the nonconforming use, extend the life of the nonconforming structure, or expand the nonconforming structure.

(7) Notwithstanding

paragraph (1) of this section, any otherwise lawful structure which is rendered nonconforming solely by reason of expansion of a public road right of way through eminent domain, purchase or other permanent governmental action may be extended, expanded, enlarged, or structurally altered; provided, that any extensions, expansion or alteration shall not encroach upon the public road right of way to any greater extent than the existing structure and must comply with all other applicable setback restrictions and requirements of this ordinance.

4.2.2 Any structure which will, under this ordinance, become nonconforming , but for which a land use permit has been lawfully granted prior to March 28, 1979, shall be considered a nonconforming structure.

4.2.3. No junkyard or auto reduction yard shall continue as a nonconforming use after October 12, 1984, but it may continue as a conditional use in a business, industrial, or agricultural district if, prior to October 13, 1984, the land owner applied for and obtained a conditional use permit to continue said operation."

12. However, with respect to adult business, Section 7.10.3 or ordinance No. 242 renders all nonconforming adult uses unlawful as of July 31, 1998.

COUNT I - WRONGFUL DENIAL OF REQUESTED VARIANCE

13. Plaintiff adopts the allegations set forth in Paragraphs 1-12, supra.

14. On July 22, 1998, Plaintiff, through the services of McLaughlin Consulting Services, Inc., submitted an application for a variance of the distance requirement, pursuant to the provisions of Section 11.5 of the Benton County Development Code. A copy of the cover letter of the McLaughlin Consulting Services, Inc., submitting the variance application, is attached hereto as Exhibit C.

15. The variance application was further supported by a two-volume planning review submitted by McLaughlin Consulting Services. A copy of the two volumes of the

planning review is attached hereto as Exhibits D and E.

16. A hearing on the variance application was held before the Benton County Board of Adjustment on September 17, 1998. A true a correct copy of a verbatim transcript of those proceedings is attached hereto as Exhibit F and incorporated by reference as if fully set forth herein.

17. Through the planning review and testimony presented at the hearing, Plaintiff presented essentially uncontradicted evidence that:

a. Strict enforcement of the amortization provision of the Benton County Adult Use Ordinance would work in extreme hardship on Plaintiff due to circumstances unique to the property and not created by Plaintiff.

b. The variance, if granted, would not alter the essential character of the locality.

c. The terms of the variance would be consistent with the comprehensive plan.

d. That Plaintiff's use is consistent with the uses permitted in the zoning district in question.

18. Notwithstanding the foregoing, the Benton County Board of Adjustment, on October 15, 1998, adopted written findings, a copy of which is attached hereto as Exhibit G, finding that Plaintiff had not demonstrated hardship, that Plaintiff could put the property to reasonable use, that the hardships are not due to circumstances unique to the property, but Plaintiff purchased the property after the adult use provisions were enacted and therefore had constructed knowledge thereof, and that the variance, is granted, "would alter the family neighborhood character of the locality."

19. As a result of the foregoing factual findings, the variance application was denied.

20. The findings of the Board of Adjustment were arbitrary, capricious, and unsupported by the evidence presented to the Board of Adjustment.

21. As a result, Plaintiff is entitled to an order pursuant to Minn. Stat. Sec. 394.27, Subd. 9, compelling Defendant to issue the requested variance to Plaintiff.

COUNT II - UNCONSTITUTIONALITY OF ZONING ORDINANCE

22. Plaintiff adopts and incorporates by reference as if fully set forth herein the allegations set forth in paragraphs 1-21, supra.

23. This count is brought pursuant to Title 42 U.S.C. Sec. 1983, seeking to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities guaranteed to Plaintiff under the Constitution of the United States, in particular under the First and Fourteenth Amendments thereto.

24. Benton County Ordinance No. 242 is facially unconstitutional and unconstitutional as applied to Plaintiff in violation of the First and Fourteenth Amendments to the United

States Constitution on the following grounds:

a. The ordinance is not narrowly tailored to those uses reasonably beleived to cause adverse secondary effects and thus is unlawful content-based censorship.

b. The ordinance, if implemented, would have the effect of suppressing or substantially reducing access to constitutionally protected speech.

25. As a result, Plaintiff is entitled to a declaratory judgment declaring ordinance No. 242 to be unconstitutional, on its face and as applied.

COUNT III - UNREASONABLE AMORTIZATION

26. Plaintiff realleges the allegations set forth in paragraphs 1-25, supra.

27. As already noted, supra, other than adult entertainment uses, the only other use amortized out of existence under the Benton County Development Code are junkyards and auto reduction yards, and even those uses were

permitted to remain as conditional uses.

28. In fact, every junkyard or auto reduction facility rendered nonconforming by the Benton County Development Code was in fact granted a conditional use permit to continue in existence.

29. King's Inn, when owned either by Plaintiff or its predessessors, has invested substantial sums of money into the business, including improvements uniquely designed for an adult entertainment facility, and usable for no other purpose. These include the following:

a. An initial purchase price of $300,000.

b. A custom-built roof which eliminated the ventalation system necessary to allow the building to continue as a restaurant.

c. A custom-built stage usable for no other purpose other than adult entertainment, costing at least $63,000.

d. A dome containing custom made lighting, speakers and sound system, costing in excess of $80,000.

e. A security and monitoring system costing in the neighborhood of $43,000.

f. A DJ booth and wiring system costing apporximately $50,000.

30. In light of the substantial investement in the premises, in particular investement in facilities usable for no other purpose other than adult entertianment, a four-year amortization period is not reasonable within the meaning of Minn. Stat. Sec. 394.36, Subd.2.

31. As a result, Plaintiff is entitled to a declaratory judgment invalidating the amortization provision under the statute.

COUNT IV - UNCONSTITUIONAL TAKING

32. Plaintiff realleges the allegations set forth in paragraphs 1-31, supra.

33. In light of the substantial investement by Plaintiff and its predessessors on the subject premises, including investement and facilities usable for no other purpose other than adult entertainment, the amortization provision of Ordinance No. 242 constitutes an unlawful taking of Plaintiff's property, without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, a taking, destruction, or damaging without just compensation, within the meaning of Article 1, Sec. 13 of the Minnesota Constitution.

34. As a result, Plaintiff is entitled to a writ of mandamus compelling Defendant to render just compensation to Plaintiff for the taking, destruction, or damaging of its property caused by the amortization provision in ordinance No. 242.

EQUITY AND IRREPARABLE INJURY

35. Plaintiff realleges the allegations set forth in

paragraphs 1-34, supra.

36. Each day Plaintiff operates in violation of ordinance No. 242 subjects Plaintiff to criminal penalties of imprisonment of up to 90 days, a fine of $700, or both.

37. As a result, Plaintiff faces irreparable injury in that it is forced to chose between the exercise of rights guaranteed by the First Amendment to the United States Constitution, on the one hand, or criminal prosecution on the other hand.

38. Plaintiff had no adequate remedy at law.

39. As a result, Plaintiff is entitled to a temporary and permanent injunction, as well as a temporary resraining order, enjoining and restraining Defendant from enforcing the provisions of ordinance No. 242 against Plaintiff.

WHEREFORE, Plaintiff request the judgment and decree of this Court as follows:

a. That this Court reverse the decision of the Board

of Adjustment and issue an order compelling Defendant to issue a variance to Plaintiff permitting Plaintiff to continue its present use at its present location notwithstanding its location within 500 feet of residentially zoned property.

b. In the alternative, that this Court issue a declaratory judgment declaring ordinance No. 242 to be facially unconstitutional and unconstitutional as applied, in violation of the First and Fourteenth Amendments to the United States Constitution.

c. In the alternative, that the declaratory judgment declare the amortization provision of ordinance No. 242 to be unreasonable within the meaning of Minn. Stat. Sec. 394.36, Subd. 2.

d. That this Court issue a temporary and permanent injunction and until a hearing can be had on a motion for temporary injunction, a temporary restraining order restraining and enjoining Defendant from enforcing the provisions of

ordinance No. 242 against Plaintiff.

e. In the alternative, that this Court issue a writ of mandamus compelling Defendant to condem Plaintiff's property and pay Plaintiff reasonable compensation therefor.

f. That Plaintiff be awarded its reasonable costs, disbursements, and attorney's fees, pursuant to Title 42 U.S.C. Sec. 1988.

g. That the Court grant such other and further relief as it may deem just, fair and

equitable.

RANDALL TIGUE LAW OFFICES, P.A.

Randall D.B. Tigue, Esq.
Attorney for Plaintiff
2901 Pleasant Avenue South
Minneapolis, MN 55408
(612) 874-9903
Atty ID No. 110000

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. Sec. 549.21, Subd. 2, to the party against whom the allegations in this pleading are asserted.

Randall D.B. Tigue
Attorney for Plaintiff
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
Telephone: (612) 874-9903
Attorney I.D. No. 110000

Dated: October 23, 1998

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VERIFICATION

Keith Kellar, being first duly sworn on oath, hereby deposes and says that he is the President of Kismet Investors Inc., the Plaintiff in the above-entitled matter, that he has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, he believes them to be true.

_____

Keith Kellar

Subscribed and sworn to
before me this____day of
October, 1998

_____

Notary Public

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN SEVENTH JUDICIAL DISTRICT
Case Type: other civil

Kismet Investors, Inc., a
Minnesota corporation,

Plaintiff,

vs. **AFFIDAVIT OF RICHARD WILSON**

County of Benton,

Defendant.

STATE OF FLORIDA)
)SS
COUNTY OF_____)

Richard Wilson, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is an attorney at law, licensed to practice in the state courts of Texas and Florida; the United States Supreme Court; the United States Courts of Appeals for the Second Fifth, Seventh and Eleventh Circuits; and numerous United States District Courts from Arizona to

Florida.

2. In addition to your affiant's legal career, your affiant has substantial experience in the adult nightclub industry.

3. Your affiant's experience in the nightclub industry began in September of 1977, when your affiant represented Michael Peter in Florida. At the time your affiant's representation of Mr. Peter began, he owned only a small adult nightclub in Orlando. Mr. Peter, two or three other employees and your affiant, over the next decade developed that one club into the largest chain of adult nightclubs in the world, operating around the United States from Honolulu to New York and Miami, between 25 and 30 nightclubs.

4. In addition, your affiant, during the mid-1980's, served as president of a company entitled Entertainment USS, a Delaware corporation, which operated

adult nightclubs under the business of "Tiffany's Cabaret." During this period of time, your affiant developed the chain and supervised the operation of seven adult nightclubs in six states.

5. Your affiant subsequently entered into a partnership with an individual in San Antonio, Texas and sought locations to open and operate adult cabarets across the country.

6. Finally, from March of 1996 through January of 1997, your affiant acted as CEO for the Michael Peters operation operating Mr. Peter's clubs pursuant to a court-ordered receivership.

7. Based upon your affiant's experience the "adult cabaret "industry" is one that has only developed in the United States over the past 15 years.

8. The adult cabaret industry is a completely different industry than the earlier "topless bar" industry. The

old topless bar industry is one which your affiant would characterize as low life, in which the bars were dirty, sleazy, and poorly operated.

9. The old topless bar industry is largely gone today, although there are still some remnants.

10. The industry has, over the past 10 or 15 years changed into what is called today the upscale adult cabaret industry, in which the similarities are more in tune with today's successful nightclub.

11. In the upscale adult nightclub industry, hospitality is strongly emphasized as well as personal safety of the customers. Unlike the topless bar industry, in which the establishment was one in which people would not care to be seen, the upscale adult nightclub industry is one in which entertainment is provided and hospitality is emphasized so that not only do people not mind being seen, but they bring in friends and clients openly and proudly. The facts that major

business deals are now closed at adult cabarets has received national publicity.

12. A major component of the upscale adult cabaret industry is the sophistication and expense of the electronics involved. This includes expensive, computer driven lighting systems and expensive computer driven sound systems, requiring a sound engineer who would design and lay out the entire sound system, direct where speakers have to be aimed, so that the sound is absorbed in some areas and reflected in others.

13. As an attorney, your affiant is familiar with the governmental studies which have concluded that adult entertainment causes adverse secondary effects, such as a decline in property values, a blight in the neighborhood, and an increase in crime.

14. Virtually all of those studies were done in the late 1970's or early 1980's, and involved studies of adult

entertainment facilities that were in the nature of sleazy topless bars, most of which have gone out of existence today.

15. To your affiant's knowledge there are no studies produced by any governmental or private agency anywhere in the United States that have attributed such adverse secondary effects to the upscale adult nightclub industry.

16. Quite to the contrary, your affiant's entire experience as an ower and operater of adult cabarets has been that such operations do not cause a decline in property values or an increase in crime; rather they customarily improve the value of surrounding property and enhance public safety.

17. Indeed, the secondary effects of neighborhood blight and crime would discourage the very clientele that the upscale cabaret seeks to attract.

18. At least one United States District Court, considering the applicability of adult enteratainment zoning

ordinances has so held. See the unpublished decision of the United States District Court for the Northern District of Ohio in *Cleveland's P.M. on the Boardwalk v. City of Cleveland,* Case No. 92 CV 1412 (N.D. Ohio 1992) a copy of which is attached hereto as Exhibit A.

19. On a trip to Minnesota, your affiant personally visited King's on the Lake in July of 1995.

20. In addition, your affiant has personally reviewed the testimony tendered with the Board of Adjustment in the above-entitled matter, as it relates to the restructuring of the roof, the installation of the lighting system, the installation of the sound system, the security system and the DJ booth.

21. The sound, lighting and security system described by Mr. Kellar of Kismet Investors in his testimonty before the Board of Adjustment is very characteristic of the type of improvements made to create an upscale adult

cabaret. A. 127

22. These types of improvements are non-existent in the sleazy topless bar, upon which governmental conclusions of adversse secondary effects are based.

23. Furthemore, such improvements are not useful for any other type of business other than an adult cabaret.

24. Your affiant executes this Affidavit in support of the motion for temporary injunction and temporary restraining order.

_____

Richard Wilson

Subscribed and sworn to before
me this____day of October, 1998

_____

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVELAND'S P.M. ON THE BOARDWALK, et al.

Plaintiffs,

vs.

JUDGE GEORGE W. WHITE

Defendant.

CASE NO. 1:92 CV1412

FINDINGS OF FACT AND CONCLUSIONS OF LAW
CITY OF CLEVELAND,

This action arises under the Civil Rights Act of 1871, 42 U.S.C. §1983 and the Court's declaratory judgment powers pursuant to 28 U.S.C. §§2201 and

The action concerns the constitutionality of §§327.01,327.02, et seq and §347.01 of the Codified Ordinances of the City of Cleveland regarding the issuance of necessary permits to operate an adult entertainment cabaret. The case came onfor hearing on plaintiffs' motion for preliminary injunction and the

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who, in the course of their Performances, wear G-strings and covering over their nipples and aureole. The

Performances, wear G-strings and covering over their nipples and aureole. The performers would not dance in the nude. Tiffany's has not been able to present the artistic dance performances it desires to present. Specifically, the City of Cleveland informed it that if it were to present those performances, Tiffany's would be considered and "adult use" under the City's zoning laws, and would be required to obtain a permit to operate as an "adult entertainment cabaret." Without such a permit, Tiffany's would be prohibited from presenting the performances it desires to present. Tiffany's is located in a large building that is approximately 13,200 square feet on the west side of the Cuyahoga River. It is bordered from the northeast to the southwest by navigable portions of the Cuyahoga River. To the south is a parking lot that is approximately six-hundred (600) feet long. Directly to the east and southeast is a row of other restaurants, nightclubs and other entertainment businesses. Inside the building, the first floor has a large center state, and a small stage at the east end of the building. There is a large bar at the east end, and smaller bar at the west end. The room is furnished with large, overstuffed fabric chairs. The walls are covered with beveled-glass strip mirrors. The carpeting is designed to be reactive to black light, with streaks of color that appear to glow in the dark. The second floor is a mezzanine surrounding the center stage on three sides. A steel staircase, carpeted and lighted, leads from the mezzanine to the center stage. There are two stages

on the second floor, one at the east end and one at the west end. There is customer seating throughout both first and second floors. There is a state-of-the-art theatrical lighting and sound system. Approximately five hundred thousand dollars ($500,000) was spent to remodel the interior of the building, which had previously been used as a restaurant. Tiffany's attracts and markets itself to an upscale clientele. It does a a substantial amount of credit card business, and, while it does not have a strictly enforced dress code, business attire is the predominant dress of its patrons.

On July 1, 1992, pursuant to the direction of the city's officials, plaintiffs submitted an application for a permit to operate as an adult entertainment cabaret, and from that date to the present, plaintiffs have been restrained from presenting the dance performances that they desire to present. As a result of having been restrained by the City's permit and zoning laws from presenting the dance performances that they desire to present, plaintiffs have been forced to present different performances. As a result, the erotic message Tiffany's entertainers seek to present has been suppressed, a number of entertainers have left Tiffany's, and plaintiffs have had difficulty in attracting the highest quality entertainers available. Under the City's zoning code, before any business may operate at a particular location, it must first obtain a permit, in the form of a certificate of occupancy, from the Commissioner of Building and Housing ("Commissioner"). The Commissioner has delegated to the Zoning

Administrator the duties of reviewing and passing upon applications for such permits. Section 327.02(d) of the zoning code expressly provides that "No permit or certificate of occupancy shall be issued unless the proposed...use conform[s] to the provisions of this zoning code." Thus, the permit requirement and the zoning code are inextricably bound to one another.

13. Neither section 327.02, nor any other provision of the City's zoning laws, limits the time within which the Zoning Administrator must pass upon an application for a permit. Indeed, the Zoning Administrator admitted that he could take as long as he wanted in deciding whether to grant or to deny an application. If the Zoning Administrator denies a permit application, the applicant may appeal to the City's Board of Zoning Appeals ("BZA") pursuant to Chapter 329 of the City's ordinances. Members of the BZA are appointed by the Mayor. Prior to any action by the BZA, a public notice of the hearing must be issued and written notice must be given, at least seven days in advance, to the directly affected property owners. None of the provision of Chapter 329 requires the BZA to hear an appeal within any specified period of time, or once heard, issue its decision within a given time period.

15. A permit applicant's only recourse for judicial review of the administrative decision is through the procedures set forth in Chapter 2506 of the Ohio Revised Code. Upon filing such an appeal, the administrative body is provided Forty (40) days to file a transcript of the proceedings. See Ohio Rev. Code §2506.02. And, once the case is initiated, it proceeds as

(1) of §347.07 prohibits an adult cabaret from locating within 1,000 feet of a residence district. Paragraph (b)(3) prohibits an adult cabaret from locating within 1,000 feet of another adult cabaret, a pool or billiards hall, or a video pinball arcade. The Zoning Administrator denied plaintiffs' application for each of the reasons set forth in Cod. Ord. §347.07 (b)(1) and (3).

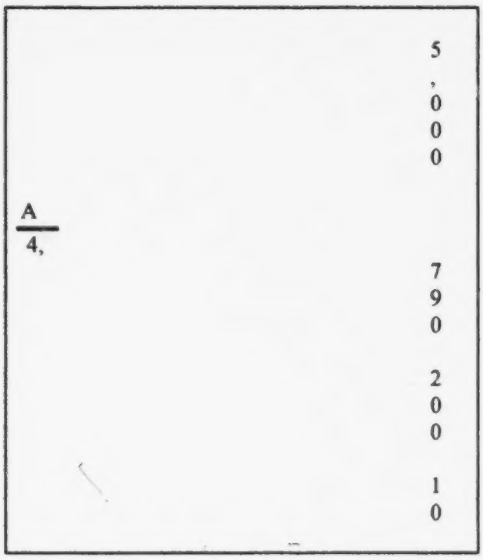
Section 347.07 does not describe how to measure the distance from an adult use to a residence district, billiards hall, pool hall, pinball video arcade, or another adult use. That is left completely to the discretion of the Commissioner, with no standards to guide her in the exercise of that discretion.

The Zoning administrator denied plaintiffs' application, inter alia, because he found Tiffany's to be 949 feet from a residence district. He reached that conclusion by exercising his discretion and measuring that distance from the property line, or lot line, of plaintiff's lessor to the residence district, in spite of the fact that plaintiffs have no interest in the land from which the measurement was taken, and in spite of the fact that because of the Cuyahoga River, it is impossible to travel directly from Tiffany's to the residence district. The Zoning Administrator testified that by the ordinary route of pedestrian travel, the distance is more than 1,000 feet. The Zoning Administrator testified that had he measured from the building to the residence district, instead of the lot line, that distance would have been more that 1,000 feet. Further, because of the

many other civil action. See Ohio Rev. Code §2506.03. There is no provision in Chapter 2506 which requires a court to rule on the merits of the appeal within a specified period of time. The Zoning Administrator has discretion to decide whether or not a particular use conforms to the zoning code, and to decide the meaning of any ambiguous portion in the zoning code, after consulting with whomever he chooses to consult, if anyone. On July 15, 1992, the Zoning Administrator notified plaintiffs that their application for a permit to operated an adult entertainment cabaret had been denied.

Paragraph (a) (6) of §347.07 of the City's ordinances defines "adult cabaret" to mean "an establishment which features topless dancers, exotic dancers, strippers or similar entertainers exhibiting 'specified anatomical areas.'" Specified anatomical areas" is defined as "A. Less that completely and opaquely covered: (1) human genitals, pubic region; (2) buttock, and (3) female breast below a point immediately above the op of the areola; and B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered." As plaintiffs' expert stated in the course of his testimony, the ordinance requires the entertainers inside Tiffany's to cover more of their bodies than they would be required to cover if they walked outside of the building, since much more of the swimwear commonly worn today would not completely cover what the City defines as "specified anatomical areas." Paragraph (b)

Cuyahoga River, a concrete factory, numerous buildings such as a warehouse and other industrial uses, it is impossible to travel directly between Tiffany's and the residence district. Indeed, one cannot see the residence district from Tiffany's. The Zoning Administrator testified that by using his choice of methods of measuring the distances, it is entirely possible for one adult entertainment use applicant, seeking to locate on a large lot, to be denied a permit because it was too close to a residence district. Meanwhile, a second applicant, whose lot was much smaller and whose building was much closer to the same residential district, would be approved. This can be demonstrated by the following diagram:



Applicant A, whose proposed adult entertainment use would be more than five thousand (5,000) feet from the residence district, would be prohibited from obtaining a permit. Applicant B, whose proposed use would be nearly four thousand feet closer to the residence district, however, would be approved.

The residence district to which the Zoning Administrator measured is at a higher elevation than is Tiffany's. In addition to deciding to measure from lot line to lot line, the Zoning Administrator exercised his discretion by deciding not to account for that fact in his calculations, which, he admitted, would increase the distance between the two.

25. The Zoning Administrator also based his denial of plaintiffs' application on the ground that plaintiffs were less than 1,000 feet from a video arcade, Powerplay, which is located in the Powerhouse, also on the west side of the Flats. The Powerhouse is a building that contains restaurants, nightclubs and other businesses, one of which is Powerplay. The Zoning Administrator found that the Powerhouse lot line was 610 feet away from the lot line of the parking lot to the south of Tiffany's.

26. Under Cod. Ord. §347.07, while an adult cabaret cannot locate within 1,000 feet of an existing video arcade, a video arcade may locate next door to an existing adult use. Thus, had Tiffany's been at it location first, Power play would be permitted to operate at its present location, and the situation would be no different that that which plaintiffs' propose it to be.

The Zoning Administrator determined that plaintiffs were 610 feet from Powerplay by measuring the distance from the property line of land owned by Cleveland's P.M.'s landlord, over which plaintiffs have no interest, to the property line of the Powerhouse. He admitted that

if he measured the distance from the building in which Tiffany's is located to the Powerhouse, the distance is approximately 1,200 feet. Specifically, two parking lots, which together are 1,100 feet long, and a road, Main Avenue, lie between Tiffany's and the Powerhouse. And, if the distance from the front of the Powerhouse to the arcade were measured, the distance from Tiffany's to the Powerhouse would be closer to 1,300 feet. The Zoning Administrator admitted that lot sizes in the City of Cleveland vary, and that lot lines may be re-drawn simply by submitting an application to the City. Buildings, he conceded, do not move, and the distance between the buildings is not subject to manipulation. Indeed, he testified that if the property line of Cleveland's P.M.'s landlord had been fifty feet from plaintiffs' building, he could not have listed Powerplay as a reason to deny plaintiffs' application because the distance between them would be greater than 1,000 feet. No matter where the lot lines are drawn, he conceded, the distance between the building in which Tiffany's is located and the Powerhouse would remain constant.

29. The third ground on which the Zoning Administrator denied plaintiffs' application was that plaintiffs were within 1,000 feet of another adult cabaret, The Circus. That distance was determined by the Zoning Administrator, in the discretion granted him by the zoning code, by measuring across the Cuyahoga River. He measured the distance over water in spite of acknowledging that the zoning code does not apply to the River at all. For example, he testified that The

Crazy Horse Showboat, which provides entertainment that would qualify it as an adult cabaret were it on land, docks on the east bank of the river, closer to the The Circus that Tiffany's is located. Nevertheless, it is not required to obtain a permit to operate as an adult cabaret. Measured by the ordinary route of pedestrian travel, he testified that the distance from Tiffany's to The Circus was well over 1,000 feet. The final ground for denying plaintiffs' application was that Tiffany's was located less than 1,000 feet from Jillian's Billiards Club, a well-decorated, attractive and upscale facility. Under §347.07, while an adult cabaret may not locate within 1,000 feet of an existing billiards hall, a billiards hall is permitted to locate next door to an existing adult cabaret. Indeed, the Zoning Administrator admitted that billiards halls could surround an existing adult cabaret. As is the case with a video arcade, had plaintiffs been in their location first, Jillian's would be permitted to operate at its location, and the situation would be no different that that which plaintiffs propose. In the last 7 to 10 years, a district group of adult cabarets had opened in various locations across the country. According to the unrebutted testimony of plaintiffs' expert witness, Richard Wilson, which the Court credits, these particular cabarets differ significantly from the "strip joints" that existed when adult business zoning ordinances first began to appear. IN fact, they have begun to appear only in the last decade. The earlier "strip joints" were generally small, dimly lit places which tended to located in more rundown, blighted areas of communities. They had no theatrical lighting or expensive sound system and

generally attracted a different clientele than do the newer, upscale cabarets.

32. By way of contrast, this new class of cabarets is characterized by their much larger size, the luxury and quality of the décor, as well as the attention that is paid to service, which is virtually the same as one would find in a finer restaurant.
These are cabarets located in major retail and commercial areas in cities such as New York, Dallas, Houston, Fort Lauderdale and Phoenix.

33. This district group of cabarets does not cause an increase in crime in the areas in which they are located, and do not cause neighborhood blighting.
The property values in the area where they are located have not decreased as a Result of their presence.

34. Plaintiffs' establishment, Tiffany's, is in that district category of adult cabarets. The evidence before the Court shows that Tiffany's will not cause any adverse secondary effects such as increase in crime or a decrease in property values in the area in which it is located. As a "destination business," that is, one to which people plan in advance to go, Tiffany's will positively affect the area in which it is located by attracting patrons to the Flats during the winter time when much of the activity and business there is diminished.

35. As a result of their application for permit being denied, plaintiffs brought this action under 42 U.S.C. §1983, seeking a declaration that the City's adult use permit scheme and zoning laws, and the denial of their application for a permit, violated their rights guaranteed by the First and Fourteenth Amendments. Plaintiffs seek an injunction prohibiting the City from enforcing those laws against them and requiring the City to issue to them the permits they need to operate an adult cabaret.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over plaintiffs' claim for the deprivation of their rights guaranteed by the First and Fourteenth Amendments, pursuant to 28 U.S.C. §1343 (a)(3). This Court also has jurisdiction pursuant to 28 U.S.C. §1331, this being a civil action arising under the Constitution and laws of the the United States.

2. The issuance of preliminary injunction requires consideration of four factors: (1) whether the movant has established a substantial likelihood of success on the merits; (2) whether there is a threat of irreparable injury to the movant; (3) whether granting the injunction will inflict harm on other parties;and (4) whether the public's interest is served by granting of injunctive relief.
NAACP v. City of Mansfied, 866 F.2d 162, 166 (6th

Cir. 1989); American Motor Sales Corp. v. Runke, 708 F.2d (6th Cir. 1983).\ Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claims. The dance performances which plaintiffs seek to present at Tiffany's are protected expression under the First and Fourteenth Amendments. Barnes v. Glenn Theatre, Inc., 111 S. Ct. 2456, 115 L.Ed.2d 504 (1991); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L.Ed.2d 671 (1981).

5. Laws which impose upon a speaker the burden of obtaining a permit in order to present and engage in expressive activity are, by definition, prior restraints, and "any system of prior restraints of expression…bear [s] a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan 372 U.S. 58, 83 S. Ct. 631, 639, 9 L.Ed.2d 584 (1963).

6. Permit schemes such as that enacted by the City must contain procedural safeguards to ensure that First Amendment interest are protected. FW/PBS, Inc. v. City of Dallas, 493, U.S. 215, 110 S. Ct. 596, 107 L.Ed.2d 603 (1990); Riley v. Nat'l Fed. Of the Blind, 487 U.S. 781, 108 S. Ct. 2667, 101 L.Ed.2d 669 (1988); Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L.Ed.2d 649 (1965). Specifically, they must required that the decision to issue a Permit be made within a brief, specified period of time. In the event , a permit is denied, the law must provide for prompt, independent judicial review of the denial so as to minimize the suppression of protected expression. FW/PBS,

supra; Teitel Film Corp. v. Cusack, 390 U.S. 139, 88 S. Ct. 754, 19 L.Ed.2d 966 (1968); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 91 S. Ct. 1400, 28 L.Ed.2d 822 (1971); Freedman. The absence of those protections renders a permit scheme unconstitutional on its face. FW/PBS.

7. The permit scheme created by the City of Cleveland under which Plaintiffs are required to obtain a permit before they may operate an adult cabaret and present constitutionally protected expression fails to meet these constitutional prerequisites. Fist, contrary to Freedman and its progeny, §327.02 does not require the Zoning Administrator to pass upon an application for a permit within any specified period of time. In addition, in the event a permit is denied, an applicant's recourse Is to file an appeal with the Board of Zoning Appeals ("BZA") pursuant to Chapter 329 of the City's ordinances. That chapter requires that public notice be given seven days prior to a hearing but does not require the BZA to hear an appeal within any specified period of time, or, once heard, render a prompt applicable to First Amendment businesses was recently held unconstitutional, where the entire administrative process, calculated from the submission of the application, could take no longer than sixty-six (66) days. The ordinance challenged by the plaintiffs in this case, however, "on its face does not purport to require when a determination must be made....[D]elay compels the speaker's silence. Under these circumstances, the licensing provision cannot stand."

Riley, 08 S. Ct. 2680. A fortiori, this law is clearly unconstitutional. Nor does the City's permit scheme provide for prompt judicial review of a license denied. Rather, it requires an applicant to follow the procedures in Ohio Rev. Code Chapter 2506. That law grants the BZA forty days to file a transcript of the proceedings, Ohio Rev. Code §2506.02, and during the time such an appeal is pending, protected expression is suppressed.

10. For all those reasons, the permit scheme created by the City, with which the zoning laws are inextricably bound, fails to meet the constitutional prerequisites necessary to prevent the city from "requiring person to invoke unduly cumbersome and time consuming procedures before they may exercise their constitutional rights of expression," Shuttlesworth v. City of Birmingham, 354 U.S. 147, 161, 89 S. Ct. 935, 944, 22 L.Ed.2d 162 (Harlan, J., concurring), permit they seek to operate an adult cabaret at their location. FW/PBS: Freedman; Teitel Film Corp.

11. In addition to the constitutional defects in the City's permit scheme, The City's laws challenged by plaintiffs suffer from another defect. Laws which onfer discretion to government officials as to whether to permit or deny Expressive activity are unconstitutional. Forsyth County v. The Nationalist Movement, 60 U.S.L.W. 4597 (No. 91-538) (June 19, 1992); FW/PBS, supra; City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988); Shuttlesworth, supra.

12. Without express standards by which to measure an official's action, "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the license is permitting favorable, and suppressing unfavorable, expression." Lakewood, 108 s. Ct. at 2144.

13. The city's zoning code, which is silent as to how the 1,000 foot distance for an adult use is to be measured, confers unconstitutional discretion on the Zoning Administrator, and leaves him free to choose any method he desires to obtain any result he desires. As the Court found, the Zoning Administrator exercised discretion to measure that distance from point of land over which plaintiffs exercise no control. Further, he elected not to account for the difference in elevation between the points he measured, even though he acknowledged that had he done so, the distance would increase.

14. The unconstitutional discretion conferred upon the Zoning Administrator resulted in his exercising that discretion to measure the distance from the property line of the lot where Tiffany's is located, to both the residence district and to the video arcade. As a result, plaintiffs were denied the permit they sought. Had the Zoning Administrator exercised his discretion otherwise, and measured 1,000 feet from Tiffany's itself to each of those places, the distance to each would be over the 1,000 foot distance, and he could not have denied plaintiffs' application for those reason.

15. Further, by exercising his discretion and measuring the distance to The Circus across the Cuyahoga River, to which the Zoning Administrator admitted to the zoning laws do not apply, he was able to find that plaintiffs were within 1,000 feet of that establishment and deny plaintiff's application. Had

he exercised discretion and measured the distance by land, rather than by sea, thedistance would be over one mile. In sum, had the Zoning Administrator exercised discretion to measure from Tiffany's to the residence district, The Circus and to Powerplay in another manner, not one of those reasons could be used to deny plaintiffs' application. The silence of the code confers unconstitutional discretion upon government officials and permits them to suppress protected expression. Accordingly, plaintiffs are entitled to the permit they seek. FW/PBS; Shuttlesworth; Lakewood. Laws enacted by a municipality which govern adult uses can survive a constitutional attack only if, inter alia, the municipality can prove that the law is unrelated to the suppression of protected expression, that it further a substantial governmental interest and that is narrowly tailored to further that interest. City of Renton v. Playtime Theatres, Inc., 457 U.S. 41, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986); Schad v. Borough of Mount Emphriam, supra, Young v.American Mini-Theatres, 427 U.S. 50, 96 S. Ct. 2440, 2445, 49 L.Ed.2d 310 (1976); Chirsty v. City Ann Arbor, 824, F.2d 489 (6th cir. 1987); CLR Corp; v. Henline, 702 F.2d 637 (6th Cir. 1983); Keego Harbor, Inc. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981); Morscott, Inc. v. City of Cleveland 781 F.Supp. 500 (N.D. Ohio 1990).

17. In order to overcome the presumption that law is intended to suppress expression, the burden of proof is on the municipality to demonstrate that at the time the

ordinance was enacted, it was attempting to address the adverse secondary effects caused by a concentration of adult uses. Renton, 106 S. Ct. 930-31; Christy, 824 F.2d at 491, 493; CLR Corp., 702 F.2d at 639. "The Burden of proof is [also] on the City to show that more than a rational Relationship exists between the ordinance and this government interest. Christy, 824 F.2d at 493; Keego Harbor, 657 F.2d at 97 n.3. In this case, the City of Cleveland completely failed to meet that burden because it failed to introduce any evidence to justify its restrictions on adult entertainment cabarets. Not a scintilla of evidence was presented to suggest that the restrictions imposed on adult entertainment cabarets in §347.07 was enacted for any purpose other than to suppress constitutionally protected expression. For that reason alone, plaintiffs are highly likely to succeed on their claim that the City's adult zoning law is unconstitutional. Renton; Schad; Young; Christy; CLR Corp.; Keego Harbor. As was previously noted, the City bears the burden of proving that a concentration of adult entertainment cabarets would result in specific adverse secondary effects, such as urban blight, an increase inn crime or a decrease in property values before it may constitutionally legislate restrictions on the cabarets, and the City made no such showing. Renton; Young; Keego Harbor; Morscott.

20. But applying the zoning law so as to deny plaintiffs' application for a permit because The Circus, a cabaret located on the opposite side of the Cuyahoga River, is less than 1,000 feet away when measured across the

water, does not further any governmental interest. Plaintiff's building and The Circus are not concentrated, or close to each other, in any sense of the word. Indeed, they are more than a mile apart if one were to travel by land.

21. Similarly, no evidence was presented by the City to suggest that any governmental, interest, substantial or otherwise, would be served by §347.07's requirement that adult cabarets be more than 1,000 feet from billiards halls or video arcades, and no evidence of any adverse secondary effects was introduced to cause the Court to conclude that such problems would arise if such uses were nearer that 1,000 feet. But even if the City had tendered such evidence, §347.07 does not further that interest at all Renton; Christy; Keego Harbor. Indeed, it is irrational. For, under §347.07, video arcades and billiards halls are permitted to locate within 1,000 feet of an existing adult cabaret. But an adult cabaret is not permitted to locate within 1,000 feet of an existing pool hall or video arcade. That result is irrational and cannot withstand even minimal constitutional scrutiny. CLR Corp., 702 F.2d at 639. Cf. Morscott, 781 F. Supp. at 504.

22. Further, adult use zoning laws which affect establishments that do not produce unwanted secondary effects violate the First and Fourteenth Amendments. Justice Powell, who provided the fifth vote necessary to

sustain the ordinance regulating adult theaters challenged in Young, observed, "The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding neighborhoods." Id. At 2548 (Powell, J., concurring). See also Renton, 106 S. Ct. at 931 (the "ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects...) Renton, 106 s. Ct. at 931. See also Schad, 101 S. Ct. at 2185. The evidence before the court is uncontradicted that Tiffany's, an upscale facility, will not produce adverse secondary effects. To the contrary, the unrebutted testimony revealed that plaintiffs' establishment will positively impact upon the area in which it is located. Accordingly, for all the foregoing reasons, plaintiffs are highly likely to succeed on the merits of their claim that §347.07 is unconstitutional both on its face and as applied to them. Plaintiffs have also demonstrated they will suffer irreparable injury If a preliminary injunction were not to issue. The Supreme Court held, in Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976), "The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes Irreparable injury. 427 U.S. 347, 353, quoting New York Times v. Sullivan, 403 U.S. 713, 91 S. Ct. 2140, 29 L.Ed.2d 822 (1976); Morscott, 781 F. Supp. At 506. "The denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction." Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987). See also Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (injunctive relief appropriate to p

prevent injury to plaintiff's First Amendment rights). Each day that plaintiffs are denied the right to present the constitutionally protected dance performances they desire to present, their First and Fourteenth Amendment rights are being abridged. Thus, the second factor favoring the issuance of an injunction is present.

25. The third factor to be considered in determining whether an injunction should issue, whether an order enjoining the enforcement of the laws at issue will harm others, also, falls in plaintiffs' favor. Plaintiffs business is located in the Flats, an area which contains innumerable bars, taverns and restaurants. Due to plaintiffs' location, it is inconceivable that the issuance of a preliminary injunction will cause harm to any citizen or the City. See Morscott, 781 F. Supp. At 506.

26. The fourth factor to be considered, whether the public interest is favors plaintiffs. "It is in the public interest to uphold a constitutionally protected right." Playboy Enterprises v. Meese, 639 F. Supp. 581, 587 (D. D.C. 1986). That interest is particularly acute when freedom of expression is infringed by a prior restraint, "the most serious and least tolerable infringement on First amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L.Ed.2d 683 (1976); Morscott, 781 F. Supp. At Accordingly, the fourth factor in favor of the issuance of a preliminary injunction is present. For the forgoing reason, plaintiffs' motion for a preliminary injunction is granted. Defendant, its officers, agents, employees, attorneys and

those active concert or participation with them are enjoined, pending final hearing, from enforcing §§327.01, 327.02, 329.01 et seq. and §347.07, or any of them, against plaintiffs. The City is further ordered, pending final hearing, to issue to plaintiffs all of the necessary permits to allow plaintiffs to operate an adult entertainment cabaret at their location. No bond is required.

IT IS SO ORDERED.

George W. White
UNITED STATES DISTRICT JUDGE

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BENTON SEVENTH JUDICIAL DISTRICT

Case Type: Other Civil

Case Title: Court File No. 98-001240

Kismet Investors, Inc.,
a Minnesota Corporation,

Plaintiff,

v.

County of Benton,

Defendant.

DECLARATION UNDER PENALTY OF PERJURY

OF ROBERT BRUCE McLAUGHLIN

I, ROBERT BRUCE McLAUGHLIN, of the City of Indian Rocks Beach, Pinellas County, Florida, DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE STATES OF MINNESOTA AND FLORIDA, AS FOLLOWS:

I. BACKGROUND

1. I am in practice as a land use planning Consultant and local government Consultant in the States of Florida, Minnesota, and elsewhere in the United States.

2. I have a Masters of Science degree in Urban and Regional Planning with a thesis on intergovernmental relationships in the planning process and an undergraduate degree in Political Science with a thesis on American Constitutional Law.

3. I am a member of the American Institute of Certified Planners and of the Canadian Institute of Planners. Membership in the American Institute of Certified Planners is the equivalent of licensing for planners in 48 states.

4. My credentials as a land use planner have been accepted by local governments on many occasions in the past.

5. I have been qualified as an expert witness in land use planning and local government consulting before the United

States District Court for the Middle District of Florida, Jacksonville, Fort Myers, Ocala, Orlando, and Tampa Divisions; the United States Bankruptcy Court for the Middle District of Florida, Tampa Division; the United States District Court for the Northern District of Ohio, Akron and Cleveland Divisions; the United States District Court for the Southern District of Ohio, Columbus Division; the United States District Court for the District of Minnesota, the United States District Court for the Southern District of Florida; the United States District Court for the Northern District of Texas, Dallas Division; the Circuit Courts for various counties in the State of Florida; the County Courts for Hillsborough and Pinellas Counties, Florida; the District Court in and for Stearns County, Minnesota; the Circuit Court in and for Jackson County, Missouri; the District Court in and for Clark County, Nevada; the Superior Courts of the State of Washington, in and for the Counties of King and Snohomish; the Court of Common Pleas in and for Clermont

County, Ohio; and the Hearing Examiner for Snohomish County, Washington. When I have been qualified as an expert witness, it has often been on the issues of the alleged adverse secondary effects of Adult Uses and/or the issue of alternative avenues of communication for Adult Uses and other Adult Use related issues. In addition, I have been qualified as an expert witness with regard to other land use issues such as Comprehensive Planning, Zoning, demographics and the like. No Court has refused to qualify me as an expert witness on these subjects.

6. I am and have previously been retained as a professional land use planner in Benton County, Minnesota, various cities and counties in the State of Florida and in the States of Alabama, Georgia, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Washington, Wisconsin, and the District of Columbia,

and elsewhere, by various private entities who have interests in land or businesses in the respective jurisdictions, and/or by local governments.

7. I was appointed by the Board of County Commissioners of Hillsborough County, Florida, as a Zoning Hearing Master, to make recommendations with respect to applications for amendments to the Hillsborough County Zoning Code, applications for conditional uses, and Developments of Regional Impact, and to reach Conclusions of Law and to make Findings of Fact and Findings of Consistency or Inconsistency with the Comprehensive Plan with respect to these applications. See Laws of Florida, 1983, C. 83-416.

8. I have been approved by the Florida Division of Administrative Hearings and by the Central Puget Sound (Washington) Growth Management Hearings Board as a non-attorney Petitioner's representative in Comprehensive Plan consistency challenges. I have also been approved by the City

of Arlington, Texas Amortization and Appeals Board as a non-attorney Petitioner's representative in an amortization extension application.

9. I have been engaged extensively in work involving the review of government actions, and the documentation thereof, including procedures followed for enactment, notices given, referrals made, the substance of the enactment, and the like.

10 In particular, I have previously been retained to research zoning and other ordinances and statutes governing Adult Uses; to conduct an independent analysis, and to testify about those Ordinances with respect to:

a. the nature of the legislation;

b. the methods employed in its enactment;

c. whether or not the legislation has a reasonable scientific planning predicate, *i.e.* whether the perceived evil which the government allegedly seeks to address is actually engendered by the

activity sought to be regulated, so that the regulation furthers a substantial governmental interest. With respect to Adult Uses in general and the subject legislation in particular, this part of my work focuses on whether or not there is factual, evidentiary support for the allegations that there are adverse secondary effects associated with adult cabarets such as those of Plaintiff;

d. whether the legislation is factually arbitrary and capricious either on its face, or as applied to particular properties; and

e. whether the legislation provides adequate alternative avenues of communication for Adult Uses.

11. I have also frequently been retained to make public records requests of local governments, and to follow-up those

requests as necessary.

12. I have been retained by operators of other Adult Uses in Alachua, Brevard, Broward, Citrus, Duval, Hillsborough, Leon, Pasco, Pinellas, Sarasota, and St. Johns' Counties, Florida, and in Alabama, Georgia, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Washington, Wisconsin and the District of Columbia, to offer professional planning services related to Zoning Regulations and other legislation affecting Adult Uses.

13. My work on local government issues related to adult entertainment has not been exclusively on behalf of adult entertainment businesses. I have also been retained by the County Attorney's office of Adams County, Colorado, to undertake an analysis of the alternative avenues of communication for Adult Uses (sexually oriented businesses,) in unincorporated Adams County. In particular, I was retained to

determine if, with the "grandfathered" Adult Uses, and, with applying central place theory to the range and threshold of goods and services provided by unincorporated Adams County, the County provided an adequate number of Adult Use sites. I concluded that, in the circumstances of the County, it did provide an adequate number of sites.

14. I have also been retained by special counsel for the City of Pensacola, Florida, and for the Town of Pembrooke Park, Florida, to advise the municipalities' respective councils with respect to the adequacy of their alternative avenues of communication for Adult Uses as they adopt new adult use zoning regulations.

15. I have been retained on behalf of Plaintiff, herein to offer professional land use planning and government consulting services with respect to the alleged predicate to the Benton County Adult Use Zoning Regulations and to certain other actions taken by Benton County, and purporting to regulate

Plaintiff's adult cabaret. I have also been retained to examine the issue of alternative avenues of communication for Adult Uses in unincorporated Benton County.

16. I have personally done or supervised the work described in this Declaration.

17. Accordingly, as set forth herein, I have personal knowledge of the matters hereinafter set forth, and I am competent to make this Declaration and to offer the opinions herein expressed, and would be competent to testify regarding these expert opinions if called to testify at trial.

18. My General Resume, a Supplemental Resume dealing with my First Amendment practice and a short form list of my testimony are found as Exhibits A, B and C, respectively, to this my Declaration.

19. In this matter, I have been asked to:

a. review the alleged predicates to the enactment of the Benton County Adult Use Ordinances,

and determine whether:

i. the perceived evil which the government allegedly sought to address actually exists, *i.e.* whether such perceived evils are actually engendered by the activity sought to be regulated; and

ii. whether the regulation then furthers a substantial governmental interest.

b. with respect to Adult Uses in general and the subject legislation and Plaintiff's adult cabaret in particular, this part of my work focuses on:

i. whether or not there is factual, evidentiary support for the allegations that there are adverse secondary effects associated with adult cabarets such as those of Plaintiff;

ii. whether there was anything produced in

the record before the governing body upon which it could reasonably rely including evidence that such secondary effects were engendered by the types of businesses exemplified by adult cabarets such as that of Plaintiff herein; and whether the legislation at issue could act to ameliorate such effects, and

iii. whether this legislation was necessary to, or served the governmental interest, if such secondary effects, did, indeed, exist; and

c. determine if said regulations are, from a factual standpoint, facially valid or arbitrary and capricious.

II. THE STUDIES - GENERALLY

20. I have prepared a *Planning Review* in two Volumes which was submitted to the Benton County Board of Adjustment as part of the variance application under review herein, and which is part of the record herein. I specifically adopt and endorse this two volume *Planning Review* as part of this my Declaration, as if those two volumes were fully set out herein.

21. In the course of my work I have also obtained a Study prepared by the Fulton County, Georgia, Police Department. [1] Excerpts from that Study are attached as Exhibit D to this my Declaration.

22. The resolution of the Fulton County Board of Commissioners (Exhibit D), directed the Police Department and the County Attorney's office to assemble relevant studies, and it further directed the County Attorney's office to prepare

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[1] Fuller, Captain Ron and Lt. Sue Miller, ***Fulton County Police: Study of Calls for Service to Adult Entertainment Establishments which Serve Alcoholic Beverages, June, 1995 - May, 1997***, Fulton County Police Department, Atlanta, GA, June 13, 1997.

ordinances regulating adult cabarets which serve alcoholic beverages. While one "Whereas" clause of the resolution states that the regulations will be adopted "if warranted," from the twice-repeated direction to prepare the regulations in advance of the results of the study, it is clear that the Fulton County Police Department was expected to determine that adult entertainment establishments serving alcoholic beverages would cause "adverse secondary effects".

23. Instead, the Fulton County Police Study concluded:

> "Based on this statistical study of calls for service and reported crime at adult entertainment establishments, there is no statistical correlation that shows that there is an increase in crime at adult entertainment establishments that serve alcoholic beverages. However, there is a statistical correlation that would indicate that there is greater instances [*sic*] of calls for

service and crime at non-adult entertainment establishment that serve alcoholic beverages."[2]

24. Therefore, in spite of the plain mandate of the Board of County Commissioners to justify more stringent regulation of adult cabarets serving alcoholic beverages, the Fulton County Police Department found no justification for such regulation.

25. The Fulton County Police Department Study is almost unique in its honesty. While there were, undoubtedly, some problematic sexually oriented Adult Uses that existed in the 1970s, the concept that these uses, as a class, create unique adverse secondary effects came about primarily as the result of a fraud on the Court perpetrated by the City of Detroit, and by deceitful actions of cities such as St. Paul, Minnesota.

26. The fraud perpetrated on the Court by the City of Detroit is documented in Exhibit E to this my Declaration, with

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[2] *Ibid.*

a further analysis of the writings of one affiant in the Detroit case found in Exhibit F to this my Declaration.

27. With respect to the City of St. Paul, that City, together with the Community Crime Prevention Project (as the lead author,) prepared an Adult Use Study in April, 1978. [3] No fewer than 14 times in that April, 1978, Study, do the authors assert that sexually oriented Adult Uses do not cause unique adverse secondary effects. [4] A detailed analysis of the April, 1978, St. Paul Study is found in Exhibit G to this my Declaration.

28. The Study was then reissued in June, 1978. [5] For the June version of the Study, the City was the lead author, and the

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[3] Community Crime Prevention Project of the Minnesota Crime Control Planning Board and the Division of Planning, Department of Planning and Economic Development, City of St. Paul, *Neighborhood Deterioration and the Location of Adult Entertainment Establishments in St. Paul*, St. Paul Division of Planning, St. Paul, MN, April, 1978.

[4] *Ibid., seriatim.*

[5] Division of Planning, Department of Planning and Economic Development, *City of St. Paul, Effects on Surrounding Area of Adult Entertainment Businesses in Saint Paul, St. Paul, MN, June, 1978.*

Study merely included a disclaimer that it did not apply to sexually oriented Adult Uses. [6]

29. As segregationists for decades advanced social science theories to support segregation and the "separate but equal" doctrine, so too have the opponents of free speech followed the pattern of Detroit and St. Paul in advancing the theories, supported by what can be best be described as "spurious data" that sexually oriented Adult Uses cause unique adverse secondary effects.

30. For example, *State of Florida ex rel. Hawkins v. Board of Control*, 93 So.2d 354 (Fla. 1957) was the second appearance of the case before the Florida Supreme Court **after** the

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[6] *Ibid.*, p. 3. Notwithstanding this disclaimer, the June, 1978, *St. Paul Study* is purportedly relied upon in later studies (*e.g.* The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses, *Report*, St. Paul, Minnesota, June 6, 1989; Division of Planning, Department of Planning and Economic Development of the City of St. Paul, *St. Paul 40 Acre Study*, St. Paul, MN, 1987; Manatee County Planning and Development Department, *Adult Entertainment Businesses Study for Manatee County*, Bradenton, Florida, June, 1987) for the proposition that sexually oriented Adult Uses cause unique adverse secondary effects.

Supreme Court of the United States remanded the case to Florida with a mandate that Hawkins, a Negro, be admitted to the University of Florida Law School. [7]

31. Notwithstanding the mandate from the Supreme Court of the United States, the Supreme Court of Florida declined to issue a writ of mandamus compelling Hawkins' admission to the University of Florida Law School. In so declining, the Court, held, *inter alia*,

> "... *A fortiori,* we cannot assume that the Supreme Court intended to deprive the highest court of an independent sovereign state of one of its traditional powers, that is, the right to exercise a sound judicial discretion as to the date of the issuance of its process in order to prevent a serious public mischief. As recently

[7] *Hawkins* was decided by the Supreme Court of the United States at 347 U.S. 971, 74 S.Ct. 783, (1954), based on the "segregation cases" – *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

as June 4, 1956, in *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board*, 351 U.S. 266, 76 S. Ct. 794, 799, ... the Supreme Court recognized the 'dominant interest' of a state in **preventing violence**. It there said: 'The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect.' We are cognizant of our duty to compel relator's admission to the University of Florida Law School 'without delay', if it is feasible to do so at this time; but **we have an equally compel-**

ling duty to perform in respect to the public peace and a long-established state judicial procedure by which to perform it. We point out, additionally, that the relator, having a choice between a federal and a state court, selected this court as the forum in which to try his cause; he thereby selected the rules of practice and procedure long established in this jurisdiction. We have no doubt that the Supreme Court intended that we should adhere to such procedure in the instant controversy. The relator's contention in this respect cannot, therefore, be sustained.

"...

"Against the background, we have considered

the evidence adduced by the respondents which, in the state of the record here, must constitute the basis for the exercise of our discretion in the matter. The factual material on file in this court reflects a prodigious amount of work by the commissioner and the respondents or those acting in their behalf. It is not contended - nor could it be - that there was even a modicum of bias on the part of any person involved in the work of assembling the data here presented nor in the formulation of the questionnaires which were the basic media by which much of the information was obtained. The survey is completely objective and as accurate and comprehensive as the time available for the study would permit. The testimony of the witnesses shows no bias and reflects only a sincere desire

to do whatever is best for all concerned.

"The survey conducted under the guidance of the court's commissioner shows, among others, that a substantial number of students and a substantial number of the parents of students state that they expect to take action - which apparently is positive action - to persuade Negro students to leave the University or make it so unpleasant for them that they will move out of a dormitory room or out of a class or out of a cafeteria or otherwise stop using the facilities of the University of Florida, should integration occur. It was also shown that 41 percent of the parents of students now in our white universities would cause them to drop out of those schools or transfer to another school; and that

62 percent of the parents of white 1956 high school graduates would send their children elsewhere than to our white state institutions, if we have enforced integration. **There would be loss of revenue** to our white institutions from grants, from activities on the part of the alumni of those institutions in support of their financial affairs, and from students moving out of dormitories (many of which are being paid for out of revenue certificates), if we have integration. Those institutions would lose the support of 52 percent of their alumni, if integration occurs, which would seriously impair the financial support to be expected from our state legislature. Integration would unquestionably result in the abandonment of substantially all of the graduate work now being offered at the Florida

Agricultural & Mechanical University because it would be an unnecessary duplication of the same courses offered at the University of Florida or at Florida State University.

"**Our study of the results of the survey material to the question here, and other material evidence, leads inevitably to the conclusion that violence in university communities and a critical disruption of the university system would occur if Negro students are permitted to enter the state white universities at this time**, including the Law School of the University of Florida, of which it is an integral part. This court has an opportunity to prevent the incidents of violence which are, even now, occurring in various parts

of this country as a result of the states' efforts to enforce the Supreme Court's decision in the Brown case. We quote with approval that part of the language of Mr. Justice HOBSON in his special concurring opinion in which he said 'the testimony which was taken at the direction of this court by the Honorable John A. H. Murphree, and which is now before us for consideration, was not in the record when the Supreme Court of the United States said "there is no reason for delay". This testimony, as well as the revealing incidents (of which we may take judicial notice) which have occurred since the repudiation of the "separate but equal" doctrine, convinces me that the immediate admission of relator to the University of Florida College of Law would result in great public

> mischief." The homely expression, 'An ounce of prevention is worth a pound of cure,' is especially applicable to the situation here - involving, as it does, the public welfare of all our people." [Emphasis Added]

32. In 1988, the Supreme Court of Florida repudiated its opinion, 532 So. 2d 669 (Fla. 1988) and on May 25, 1999, the Court held a special, ceremonial session, to celebrate the 50th anniversary of Hawkins' application to the University of Florida Law School.

33. However, in the 1950s, the Supreme Court of Florida's opinion reflected the same **perceived** concerns that are attributed to sexually oriented Adult Uses today - crime (violence), and monetary losses (property values, on the one hand, tuition, expense reimbursements and donations, on the other hand).

34. Interestingly, the underpinning of the *Hawkins* decision was a survey. While the survey instrument has not been

examined, it is almost impossible for it to be any worse (in terms of compliance with the professional and evidentiary protocols and requirements [8]) than the surveys allegedly supporting adult use zoning regulations. Just as there was no evidence *per se* to show that the racial integration of the University of Florida's law school would cause violence and economic distress, also there is no evidence to show that Adult Uses cause the same alleged problems – crime and economic distress.

35. Ironically, while there were social disputes in the South that might have supported some of the *Hawkins* findings, the "social disputes" related to sexually oriented Adult Uses do **not**

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[8] *Zippo Manufacturing Company v. Rogers Imports, Inc.*, 216 F.Supp. 670, 681 - 682, 684 (S.D. N.Y. 1963); *Pittsburgh Press Club v. United States*, 579 F.2d 571 (3d Cir. 1978); Rea, Louis M. And Richard A. Parker, *Designing and Conducting Survey Research A Comprehensive Guide*, Josey-Bass Publishers, San Francisco, 1992; and Salant, Priscilla and Don A. Dillman, *How to Conduct Your Own Survey*, John Wiley & Sons, Inc., New York, 1994.

cause actual problems [9] and the ultimate history of integration is that it neither lead to higher crime, nor caused economic distress.

36. So too, as exemplified by Plaintiff's business, the truth is that sexually oriented Adult Uses do **not** cause crime or the diminution of property values.

37. The "studies" reviewed in Volume II of the *Planning Review* do not even rise to the level of conjecture or speculation – they are, with the exceptions noted in their analyses, outright deceits.

38. There is not one iota, one scintilla, of evidence that sexually oriented Adult Uses, particularly in the late 1990s, cause any "adverse secondary effects" that are, in any way, different from the effects of generic commercial uses.

39. In other words, there is no evidence that the harms which are allegedly perceived in the Adult Use "studies" are

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[9] Except were protesters against the expression exceed the limits of the First Amendment and do criminal acts in their protests.

real, or that adult use zoning regulations would, if the harms were real, ameliorate these harms to any degree, let alone a substantial and material degree.

40. At least as applied to the *King's Inn* in Benton County, the County's Adult Use Zoning Regulations advance **no** governmental purpose, let alone a substantial governmental purpose. In fact, as set out in Part IV, *infra*, the application of these regulations will work **against** the governmental interest.

III ADULT USE CHARACTERISTICS

41. By S.F. 254, the state of Minnesota has amended its zoning enabling statutes to prohibit "amortization" of most legal existing, non-conforming land uses. An exception is made for "adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance." [10]

42. As set out in part II, *supra*, and throughout my *Planning*

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[10] S.F. No. 854, 2nd Engrossment, 81st Legislative Session (1999-2000).

Review, there is no evidence whatsoever that Adult Uses cause "adverse secondary effects" that are unique or different from generic commercial uses.

43. There are three basic types of Adult Uses, and several subtypes. The first two types are well-established, the third type is relatively new.

44. Adult Uses are businesses which present protected expression, which expression is characterized by an emphasis on the presentation or depiction of specified anatomical areas or specified sexual activities. In other words, nude or partially nude dance and presentations, and books, magazines or video tapes which present or depict specified anatomical areas or specified sexual activities.

45. The first basic type of Adult Use offers live expression. Included in this group are adult cabarets providing nude or topless dancing and related entertainment, and live modeling establishments of various types.

46. The second type of Adult Use offers no live entertainment, but does sell, rent, and show movies, videotapes, magazines and books. These forms of expression are available for purchase, with most videos and movies also being available for rent. Many of these establishments also show the videotapes and movies, either in preview booths or in a small, theater-type setting.

47. The third type of Adult Use simply sells magazines and books, and sells and rents movies or videotapes. This type of use offers no on-premises viewing.

48. Within the three basic types of adult entertainment establishments there are several further divisions of type. One basic division is based on the economics of a business, primarily its patrons. The groups thus divided [11] are "upscale" where the clientele is "white collar"; much of the business is done by credit card, and there are amenities such as valet parking, food

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[11] And this division is found primarily in adult cabarets.

and beverages, (sometimes complementary), *etc.* These "upscale" uses provide a marked contrast with the older form of Adult Use which is not as carefully maintained, and which attracts a different type of both client and worker.

49. Adult cabarets can be topless or nude, can offer alcoholic beverages, and can offer food service. Live modeling presentations can be done in a variety of settings, from models working behind a glass partition, to dances performed in close physical proximity to a patron.

50. Book and video stores, with on-premises viewing can be found in a variety of physical layouts, ranging from small, conventional theaters, to full-enclosed preview booths. Again, clientele and management's diligence can have a major effect on the operation of the facility.

51. Book, magazine and video stores with no on-premises viewing all come in a variety of forms. Some stores are "percentage" stores, where the percentage of adult material is

kept below a threshold established by the local government. These stores can be marketed either as adult stores or as conventional stores.

52. Further, most, if not all, conventional book stores and newsstands, and video stores have areas of adult material, and many convenience stores have a "segment or section" of the store devoted to the display and sale of adult material. Therefore, there is a broad range of facilities which fall, or can fall, within the definition of an "adult use".

53. "Secondary effects" are land use impacts that are felt **outside** of a business or property. They are the impacts on the surrounding properties and neighborhood and are the stated rationale for zoning regulations. [12]

54. In contrast, "primary effects" are what occurs **within** a business or other land use. There "primary effects" have virtually no impact on adjacent areas, but can be problematic or

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[12] Mandelker, Daniel R., *Land Use Law, 3d Ed.*, The Michie Co., Charlottesville, VA, 1993, p. 101.

have other impacts **within** the building. [13]

55. As noted in Part II, *supra*, there is absolutely no evidence that Adult Uses, as a class, cause "adverse secondary effects" which are unique or different from those of other, generic commercial, land uses.

56. However, there is a limited amount of evidence that **within <u>some</u>** adult bookstores and adult theaters there is the potential for the transmittal of sexually transmitted disease, including AIDS and various venereal diseases. This "evidence," which has not, to the best of the Declarant's knowledge, been rigorously tested, applies to only a small percentage of the total adult bookstores and theaters extant.

57. This "evidence" further sets apart adult bookstore and adult theaters from adult cabarets, since there is obviously no

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[13] For discussions of the differences between primary and secondary effects see *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157 (1988) and *Linmark Associates v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614 (1977). The only instance in which a "primary effect" can become a "secondary effect" is on those limited occasions when police resources are diverted from other duties to address the "primary effects".

possibility of the transmittal of sexually transmitted diseases in the context of an adult cabaret.

57. There are several other distinctions between adult cabarets and adult bookstores and theaters.

58. For example, while an adult cabaret can be a variation of a "neighborhood tavern", it is more likely to have a range and threshold higher in the central place hierarchy [14] than would an adult bookstore which would be more neighborhood serving.

59. Secondly, many adult cabarets serve some form of alcoholic beverages, and thus are subject to various state and local liquor licensing requirements. Even those adult cabarets which do not serve alcoholic beverages, generally serve some drinks and other refreshments, and are thus subject to Health Department supervision.

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[14] McLaughlin, R. Bruce, AICP, MCIP, *A Functional Analysis of Adams County, Colorado in the Context of the Provision of Generic Commercial and Sexually Oriented Business Locations*, McLaughlin Consulting Services, Inc., Indian Rocks Beach, Florida, 1998; Adams County Sheriff's Department, *Adams County Nude Entertainment Study*, Brighton, Colorado, 1987; and Austin City Council, *Report on Adult Oriented Businesses in Austin*, (May, 1986).

60. Further still, a cabaret or nightclub, whether it be adult or not, is a far more intensive land use than is a bookstore, particularly the typical adult bookstore. A cabaret will have a higher trip generation rate, higher parking requirements, and will typically be in a larger building on a larger lot than most bookstores.

61. A cabaret is more likely than a bookstore to be on a major road, and to be more removed from "sensitive" land uses than is a bookstore, and a cabaret will have a higher demand for water and sewer services than a bookstore.

62. Finally, and most obviously, an adult cabaret involves live entertainment, while adult bookstore and adult theaters present recorded entertainment.

63. Therefore, as a matter of planning practice, there is a substantial and significant difference between an adult cabaret on the one hand, and an adult bookstore or an adult theater on the other.

64. Therefore, as a matter of planning practice, there is no basis, other than a subcategory of content, for treating adult cabarets as being "a similar adults-only business" to an adult bookstore or an adult theater.

IV. NON-CONFORMING USES

IV. A. KANSAS CITY, MISSOURI

65. In 1995 I was retained on behalf of Ray Cain, owner of *Ray's Playpen*, in Kansas City, Missouri.

66. Ray's Playpen was an existing adult bookstore which, pursuant to Missouri law, was "grandfathered" and not subject to "amortization". In fact, pursuant to the Kansas City, Missouri, Zoning Ordinance, the business had been granted a Certificate of Legal Non-Conforming Use.

68. The building housing *Ray's Playpen* was an older building, with an historic preservation designation. The building was configured, in part, for use as an adult bookstore,

but could, with some effort, be adapted to other retail uses.

68. Sometime prior to 1994, the City of Kansas City, Missouri, and its Tax Increment Financing Commission, gerrymandered the boundary of a redevelopment area to include *Ray's Playpen* and at least two other Adult Uses.

69. Ultimately, the City and the Commission proceeded to acquire *Ray's Playpen* by the use of the power of eminent domain.

70. The government appraised the property for a sum of approximately $225,000. A local appraiser, hired by Ray Cain, appraised the property for approximately $215,000. Neither of these appraisals assigned any value to the Certificate of Non-Conforming Use.

71. I then caused to be retained by Mr. Cain, an appraiser who was familiar with the value of a Certificate of Non-Conforming Use, particularly as it applied to a legal, non-conforming Adult Use. The appraisal taking into account the

value of the Certificate of Non-Conforming Use, was approximately $725,000. This appraisal properly reflected the value of the existing legal, non-conforming use, recognizing the history of the location and the almost total absence of relocation sites.

72. The property was ultimately purchased by the government for a sum in excess of $600,000.

73. Since the property was acquired by the government, the part of the redevelopment program applicable to the Adult Uses' sites has failed to come to fruition, and the land remains fallow.

74. As a result of its suspect acquisition of the three legal non-conforming Adult Uses, the City of Kansas City, Missouri, has lost tax revenue from this area.

IV. B. PINELLAS COUNTY, FLORIDA

75. In 1988 I was retained by Joe Redner with respect to an adult cabaret which he had opened in the unincorporated area

of Pinellas County (Clearwater/St. Petersburg), Florida. The location of Mr. Redner's adult cabaret was allegedly illegal under the Pinellas County adult use zoning regulations.

76. However, it emerged that Pinellas County had failed to comply with Florida's statutory enactment requirements for County zoning ordinances, with the result that the County's adult use zoning ordinance was null and void *ab initio*.

77. Mr. Redner operated his adult cabaret from 1988 to approximately 1994, during which time property values in the area of the cabaret increased at a greater rate than did those of a control area.

78. With its new adult use zoning regulations, Pinellas County forced Mr. Redner's adult cabaret to close in approximately 1995. Thereafter, for a period of two to three years, property values in the area of the former adult cabaret fell precipitously.

79. One basis for establishing the value of commercial real

estate, is the income generated by the real estate. Obviously, an empty building will have a significantly diminished value over one producing a steady income stream.

IV. C. ISLIP, NEW YORK

80. In 1980, the Town of Islip, New York, (in suburban Long Island), undertook an Adult Use Study. [15] While that "study" is seriously deficient and is effectively and totally contradicted by other contemporaneous Town studies, it formed the basis on which the New York Court of Appeals upheld the Town's adult use zoning regulations. [16]

81. As a result of the regulations being upheld, most of the Town's 14 Adult Uses that existed in 1980 were closed after 1989.

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[15] Town of Islip, Department of Planning and Development, *Study & Recommendations for Adult Entertainment Businesses in the Town of Islip*, Islip, N.Y., 1980 (two volumes).

[16] *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215 (N.Y. 1989).

82. In June, 1997, the Declarant conducted a field review of the 14 Adult Use sites that Islip had studied in 1980. One Adult Use continued to exist; and many of the 14 sites had been acquired by the State and made a part of the area's highway network. Two or three sites were in new retail uses.

83. However, the two sites in downtown Bayshore [17] remained vacant in 1997 – eight years after the Adult Uses were forced to close, and 17 years after the Study. The Bayshore "dead zone" on which both the Study and the Court of Appeals focused, remained long after the Adult Uses closed.

84. Obviously, leaving these two properties vacant for at least seven years will have had an adverse secondary effect on the property values in the area.

85. Even more compelling is the experience of a former adult cabaret known as *Gloria's Place* and located on Islip Avenue at Pear Street in Central Islip. Islip Avenue is a

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[17] An unincorporated community within the Town of Islip.

significant street in the Town's road system, and is primarily commercial in nature, with some residential frontage.

86. Gloria's was a two-story residence, typical of Long Island, converted to the cabaret use. The Town's complaints in its Adult Use "Study" were that the property is "Currently in poor Condition" and:

> "Minimal investment has been made in both the building and the site. The building is in need of maintenance; the parking area is un-paved. No buffer or fencing exists between this business and the residences to the north and east." [18]

problems which could be experienced by **any** property, regardless of whether or not it was a sexually oriented Adult Use.

87. Gloria's was forced to close sometime after 1989 as

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[18] Town of Islip, *op.cit.*, Site Analysis, *Gloria's Place.*

result of the amortization of the non-conforming Adult Uses by the Town of Islip.

88. Eight years later, in 1997, the building has deteriorated to the point where it is a clear and present danger to persons on the property. The building is open to the elements, it has been vandalized, there is clear evidence of sexual activity and drug use on the property, and the property is being used for illegal dumping.

89. The residential use to the North, which was of alleged concern to the Town at the time of the Study is also vacant, and several commercial uses across the street have closed.

90. There can be no doubt that the closure of *Gloria's Place* has not only dramatically and adversely affected property values in the area, but it has also brought true blight to the area.

91. Composite Exhibit H to this my Declaration is the unedited video footage of *Gloria's's Place*, shot at my direction in 1997, along with still photos copied from the video.

92. In summary, there is no doubt that forcing the closing of Adult Uses causes at least a short-term decline in property values, and that that decline can last over seven years.

V. COUNTY DOCUMENTS

93. I have also been asked to review the documents attached to the County's Motion for Summary Judgment in this matter. I have conducted that review, and would offer the following comments.

V. A. AFFIDAVIT OF RONALD PETERSON

94. For the most part, Mr. Peterson's Affidavit merely attaches and identifies various documents underlying the adoption of the County's adult use zoning regulations. These documents will be dealt with below, as necessary.

95. Mr. Peterson asserts, without specifics, that there are "numerous sites" within the unincorporated County at which

Adult Uses can locate. I respectfully disagree.

96. Mr. Peterson asserts that there are more than 2,400 acres zoned commercial and industrial in the unincorporated area of Benton County.

97. The present size of unincorporated Benton County is 258,560 acres. Even if all 2,400 + acres of commercial and industrial land in the County were available to Adult Uses – which they are not – that would represent less than one percent of the land area of the County, a figure that is a far cry from the "myriad" locations found in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976) where free speech was "effectively unrestrained," and from the:

> " more than five percent of the entire land area ... consist[ing] of '[a]mple, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is

cris-crossed by freeways, highways, and roads."

Playtime Theaters v. City of Renton, 475 U.S. 41, 106 S.Ct. 925 (1986)

98. However, it is actually far less than 2,400 acres that is available for Adult Uses. The County's adult use zoning regulations are silent as to the method ofmeasurement between an Adult Use and a segregated use. In such circumstances, both planning practice [19] and the case law [20] require that the measurement be made from property line to property line.

99. When the segregation distance is measured from property line to property line, as mandated by both planning practice and the case law, the 2,400 acres of commercial and industrial land shrinks very, very considerably. A very

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[19] *E.g.* Deposition Testimony of Leigh Kerr, *Vincent v. Board of County Commissioners, Broward County, Florida,*. United States District Court, Southern District of Florida, Case No. 97-7164 Civ-Moreno; 12/23/97, p. 10, l. 3 - p. 11 .

[20] See, generally, *Cupid's Video Boutique, v. Roth*, 610 N.Y.S.2d 24, (N.Y. App.Div. 1994); *Texas National Theatres, Inc.,v. City of Albuquerque*, 639 P.2d 569 (N.M. 1982); and *Smith v. Ballas*, 82 N.E. 2d 181 (Ill. App. 1948).

significant number of the identifiable commercial or industrial areas depicted on the zoning maps actually abut disqualifying uses or zoning districts.

100. While portions of the interior of these areas may meet the segregation requirements, the lots themselves – the appropriate measurement – do not meet the segregation requirement.

101. The County's zoning maps are at a scale and of a quality that it is impossible to accurately determine the actual alternative avenues of communication for Adult Uses.

102. However, based on my review of the Zoning Maps and some field work along U.S. Highway 10, I am presently of the opinion that there are no more than three or four actually available Adult Use sites in all of Benton County.

103. In any event, Benton County does not, as a matter of fact, "permit[s] the location of adult uses at numerous locations" within the County.

V. B. ATTACHMENTS

104. With respect to the Exhibits attached to Mr. Peterson's affidavit, several comments are merited.

105., First, on Exhibit C, the County notes that "substantial findings of fact" are necessary to support adult use zoning regulations. Yet the County relied on material that is not factual, that has no evidentiary value whatsoever, and that does not even rise to the level of conjecture and speculation. Further, much of the material on which the County purportedly relied is untruthful, deceitful or fraudulent, as set out in Part II, *supra* and in Volume II of my *Planning Review*.

106. Also of interest is an attachment to Exhibit O, the Planning Commission Minutes of January 27, 1994. The attachment comprises five pages of handwritten notes, which include the following quotes:

"Grandfathering right"

"Is there sufficient **evidence** that if unreg[ulate-d] would have detrimental 2ndary effect" [Emphasis Added]

"St. Cloud didn't study property values or [?] crime

"Affidavits from real estate appraisers."

"Robert if no v prop values ^ crime then no reason to regulate."

"Based on perceptions."

107. First, it is clear that the County contemplated grandfathering its one existing Adult Use, although it ultimately elected not to do so.

108. These notes also reflect the need for evidence, not

conjecture, speculation, innuendo, "studies" or any other information which lacks evidentiary value.

109. The County also apparently contemplated obtaining affidavits from real estate agents. Yet no such affidavits appear in the County's record. There is only one reason for the absence of these affidavits – for a real estate agent to say under oath that, as a matter of fact, sexually oriented Adult Uses adversely affect property values would be perjury.

110. There is also the comment that the regulations are based on "perceptions". Yet these perceptions, even if they really exist, do not become reality, and they are, in fact, no different from the perception that racial integration causes property values to decline. (Exhibit I to this my Declaration.

111. Finally, the notes reflect: "Robert if no v prop values ^ crime then no reason to regulate." My *Planning Review* has established, without contradiction, that property values have not fallen around the *King's Inn* and that crime has not increased in

that area. Therefore, by the County's own admission **"there is no reason to regulate"**.

112. The next relevant part of the County's documents is the Minutes of the Planning Commission of March 24, 1994 (Exhibit S). Those minutes include the following statement:

> "Lynn Machula outlined some of the concerns from minutes of the previous meeting. He reported that he spoke with assessors from Anoka County (City of Ramsey has adult use) and Morrison County (adult use near entrance to Camp Ripley). They both said there was no appreciable negative impact on the value of neighboring properties." [21]

113. The foregoing comment is the **only** item of evidentiary value in the entire County filing, and it shows no need for adult use zoning regulations.

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[21] Planning Commission Minutes, March 24, 1994, Item 4.

SIGNED AND DECLARED UNDER

PENALTY OF PERJURY OF THE LAWS

OF FLORIDA AND MINNESOTA

/s/

R. Bruce McLaughlin Date

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BENTON COUNTY, MINNESOTA ADULT USE ZONING REGULATIONS FIRST REVISED PLANNING REVIEW

VOLUME I – TEXT

Prepared For

Kismet Investors Inc.

D/b/a King's Inn

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PREFACE

This Planning Review is one of three documents being prepared to analyze the Benton County Adult Use Zoning Regulations, and their application to the *King's Inn* in unincorporated `Benton County. Volume II comprises most of the Appendices to this Planning Review, with the appendices included background data on the author, and detailed analyses of the "studies" purportedly underlying the County's Adult Use Zoning Regulations.

This Volume includes the Certificate of Findings; all of the background data and analyses, an analysis of the actual impact of the *King's Inn* on its area, and some general analyses of the issue of alternative avenues of communication for Adult Uses.

This Volume I was initially prepared for a hearing of the Benton County Board of Adjustment set for August, 1998. That hearing came shortly after the author's return from

overseas. While most of the data were available and included in the original Planning Review, the time constraints did not permit as thorough an editing as might have been desirable.

In addition, further elements of the hardship caused by the amortization provisions of the Benton County adult use zoning regulations came to light in the course of final preparations for the Board of Adjustment hearing. Additional minor substantive issues were revisited as appropriate, primarily in the form of elaborating on general statements made in the previous edition.

Accordingly, this first revised Planning Review incorporates the additional details of the hardship caused by the amortization provisions, elaborates on some too general statements in the first edition, and edits some discrepancies from the original document. Otherwise, there are no substantive changes between this document and the original Planning Review revised 8/17/98 and printed 8/19/98.

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For the reasons set out in Part D, below, it is not presently possible to do a site specific analysis of the issue of alternative avenues of communication for Adult Uses. This Planning Review will be supplemented with such a site specific analysis as soon as that work can be completed.

ACKNOWLEDGMENTS

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Benton County Development Department

Benton County Sheriff's Office

Minnesota Department of Transportation

City of St. Cloud Housing & Redevelopment Agency

Benton County Assessors Office

St. Cloud Area Planning Organization

St. Cloud Economic Development Partnership, Inc.

City Clerk's Offices, St. Cloud, Rice, Foley, Sartell, Sauk Rapids, and Waite Park

Minnesota Chapter, American Planning Association

United States Department of Commerce, Bureau of the Census

and the numerous reports, individuals and organizations credited in the footnotes in this Planning Review.

A. INTRODUCTION AND BACKGROUND:

1. PURPOSE

Benton County has purported to enact certain restrictions on the establishment and maintenance of Adult Uses as defined in the Benton County Development Code. [1] The exact Ordinance requirements for Adult Uses are set out in Chapter 9 of this Planning Review.

The purpose of this Planning Review is four-fold:

1. to determine if the Benton County Adult Use Zoning

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[1] Benton County Board of Commissioners, *Development Code*, adopted by Ordinance 185, Foley, Minnesota, November 15, 1988, as amended. Hereinafter "*Development Code*.

Regulations are, on their face, a valid exercise of the County's police power, or if they are facially arbitrary and capricious and unrelated to the legitimate exercise of the police power;

2. to determine if the Benton County Adult Use Zoning Regulations, as applied to one particular site, [2] are a valid exercise of the County's police power, or if, as applied to the subject site, they are arbitrary and capricious and unrelated to the valid exercise of the police power;

3. to review, consider and determine the amount of land

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[2] The *King's Inn*, 9450 Northwest Highway 10, Rice, Minnesota, which is actually located in unincorporated Benton County.

legally permissible in unincorporated Benton County for Adult Uses in accordance with applicable Benton County Zoning requirements and with all other applicable Land Development Regulations; and to present these data as a determination of the number of sites potentially available; as well as a gross acreage and as percentages of the entire County; and

4. to determine if, based on the previous three analyses, the Benton County Adult Use regulations, as set out in Chapter 9, below, from a factual standpoint, appear to comply with the Constitutional requirements for such regulations.

With respect to purposes 1 and 2, King's *Inn* is alleged by

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11. STUDY AREAS

In order to properly determine whether *King's Inn* causes "adverse secondary effects", it is necessary to review comparative demands for police service, and comparative property values in the areas of the Adult Use and in one or more control areas. A comparative analysis is required by both professional protocols [126] and by the case law. [127]

Accordingly, study areas were established around *King's Inn* and a control land use. The control land use was selected as a

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[126] *E.g.* Stuart, Darwin G., *Urban Indicators: Their Role in Planning*, American Society of Planning Officials, [now the American Planning Association,] Planning Advisory Service, Report No. 281, Chicago, Ill., June, 1972; Mason, Robert D., *Statistical Techniques in Business and Economics, 5th Ed.*, Richard D. Irwin, Inc., Homewood, IL 1982.

[127] *BSA, Inc., v. King County*, 804 F.2d 1104, 1108 (9th Cir. 1984).

specific use that is similar in nature to the subject use. For the control area, care was taken to ensure that it did not include any Adult Uses and, the study area around the Adult Uses was selected to eliminate as many as possible other potentially problematic land uses, an endeavor that was unsuccessful because of the proximity of *Rumors*, a conventional bar and tavern.

Additional care was taken to ensure, where possible, that trip generation and similar features of the control uses was as similar as possible to those of an adult cabaret. In particular, bar and restaurant uses are closely related, especially in intensity, to *King's Inn*, being a place of assembly differentiated only by the content of the entertainment offered..

However, it is noted that the *King's Inn* was an extremely problematic property for which to establish controls. The property is located on a major highway, but also has water frontage.

All land is unique, because of its location, if not because of its natural physical features, development, and adjacent land uses. Thus, there is always an inherent bias in any land use comparison, and this bias should be established against the interest of the study's sponsor.

In the case of the *King's Inn/Pirate's Cove* comparison, both are waterfront properties. The value of the properties around *Pirate's Cove* is clearly better than that of the properties around *King's Inn*. However, *Pirate's Cove* is on a local street with

little traffic, and it does not have any neighboring commercial uses.

In contrast, the *King's Inn* is on a major highway and, contrary to the normal study protocol, is so close to another potentially problematic land use, that this second use (*Rumors*, a conventional bar,) has to be included in its study area. However, the comparisons being made are clearly valid, and the strong bias clearly cants against the *King's Inn* and in favor of the control use.

Two further checks were made, first to determine how property values in the County as a whole changed over the study period, and second to determine calls for police service at another highway use - a Conoco Service Station/Convenience Store

located North of the *King's Inn*. These additional analyses ensures the accuracy of the findings of this Planning Review on the topic of property values and enhance the accuracy with respect to the calls for police service.

The study areas selected were 1) the *King's Inn* and residential developments to the South and West, along with the residential and commercial land uses immediately to the North; and 2) *Pirate's Cove* restaurant and bar, together with adjacent residential uses.

Census tract data [128] were reviewed to determine whether

[128] United States Department of Commerce, Bureau of the Census, *op.cit.*

resident [129] populations in the control uses and in the subject area had generally similar demographic (including housing) characteristics. This task represents a further effort to ensure the validity of the comparisons made.

[129] No data were available on daytime populations and in the context of the subject and control areas, such data would be of limited relevance.

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12. BLIGHT

As set out in Chapter 10, above, urban blight has two relatively tangible or measurable components: higher crime rates and lower property values. Less measurable indicators of blight include increases in the amount of vacant building space in an area; reductions in owner-occupied dwellings, changing demographic characteristics and intrusion of incompatible land uses.

There is a synergistic quality to urban blight, with the presence of one factor often leading to the presence of other factors. As stated in the Appendices, the Indianapolis and Los Angeles studies of Adult Uses both acknowledge that it is unclear whether Adult Uses tend to locate in areas already in decline,

or whether they cause the areas to decline.

For example, if dwelling units become tenant occupied, a result of this demographic change **might be** changes in land use characteristics, including the existence of temporary help agencies, blood plasma sales clinics, and alcoholic beverage establishments. These land uses, in turn, **might** lead to an increase in crime rates.

If crime rates increase in an area, a synergistic result might be a decline in property values. As property values decline, an area will become more attractive and affordable for lower value commercial uses, such as second hand stores, low cost retail stores, *etc.*, and other businesses looking for lower rent locations, sometimes including Adult Uses.

Therefore, urban blight is a significant problem for a local government, and warrants remedial action. Curative efforts should be made with respect to all land uses which might contribute to urban blight, including any Adult Uses which actually do create adverse secondary effects.

Urban blight is remedied by a number of governmental actions. These actions are usually administered by the local government, but are often based on Federal or State programs.

The key Federal program is the Community Development Block Grant program (*e.g.* 42. U.S.C. §§ 1437, 5318) which provides funding to local governments for the redevelopment of areas within its jurisdiction, areas which are often blighted. Minnesota permits local governments to undertake urban

A.222

renewal projects where a County or parts of it have become blighted, and urban renewal may be undertaken in both residential and non-residential areas. [130]

Urban renewal projects generally have several components, and can range from enhanced code enforcement, requiring property owners to repair their properties to comply with code requirements; to actual acquisition of blighted areas by the local government, and their redevelopment either by the government, or by a public/private cooperative effort.

Between the more extreme examples of urban renewal, above, urban renewal efforts might include repairs to a County's

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[130] *E.g.* §§ 460.001, *et.seq.*, *Minnesota Statutes.*

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infrastructure; streetscaping; development of community facilities; changes in zoning requirements to gradually eliminate incompatible land uses, as they, **on their own** cease to exist; changes in traffic patterns; and private, collective efforts to improve real properties beyond the minimum code requirements.

To address the problems of urban blight and proceed with urban renewal efforts, a local government must generally identify its blighted areas in its Development Code, Comprehensive Plan, or in urban renewal planning documents.

Benton County has not identified the area of the *King's Inn* as blighted.

A.22

Accordingly, based on the data presently available, there is limited evidence of blight in the County, and no evidence of blight around *King's Inn*. Thus, blight is not a proper predicate for the County's Adult Use Zoning Regulations.

—A.225

13. DEMAND FOR POLICE SERVICES

Inquiries were made of the Benton County Sheriff's Department to determine the demand for police services at *King's Inn* and in its study areas, and at the control use, and within its study area, as described above. Data were requested for the most recent 12 month period available. and were requested as a total of all calls for police service at each address, along with details of the call.

The data supplied by the Benton County Sheriff's Department include sufficient detail to determine the nature of each call. Calls for police service generally fall into one of three categories:

- a call related to the nature of the land use; *e.g.*

defrauding an innkeeper or drunkenness at a bar; driveaway without paying at a self-serve automobile service facility;

- a call that any business (or residence) might incur; *e.g.* robbery, burglary, bad checks, shop-lifting, *etc.*; or
- incidental calls, where the call is made from a particular location, but is unrelated to the location; *e.g.* an automobile accident on the adjacent street.

In the vicinity of the *King's Inn* there were relatively few calls. The calls that were made, other than to *Rumors* were for permits to burn, police information, to check welfare, burglary, theft from a motor vehicle damage to property a loose animal

and a warrant.

There were 28 calls to the *King's Inn*, none of which was related to the nature of the business. Of the 28 calls, nine seem to be some sort of "bar check", while there were three information calls, two motor vehicle related calls; two fire calls, four theft or burglary calls, two criminal damage calls, one suspicions person, and one call for a Department of Natural Resource violation. One call, a "terroristic bomb threat" might be linked to the nature of the business, but presumably was the result of the actions of some person opposed to the operation of the business.

There were 17 calls to *Rumors* including a firearms violation, two domestic disputes, a runaway and a terroristic threat. On

the surface, it might appear that *Rumors* has significantly less demand for police service than does the *King's Inn*.

However, the size of *Rumors* is approximately 2,270 square feet, (with a further 1,725 square feet in another use on the property,) while the *King's Inn* comprises approximately 9,285 square feet. [131] The occupancy of the loads of the buildings are based on their size, and, thus, the *King's Inn* can accommodate more than twice as many patrons as can *Rumors*, (actually close to four times as many as the *Rumors* bar building).

Accordingly, it should be expected that the *King's Inn* would generate more than twice as many, and perhaps as much as four

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[131] Telephone interview, Benton County Assessor's office, August, 1998. No data were available for Pirate's Cove, so a similar comparison of these businesses could not be undertaken.

—A.229

times as many calls as *Rumors*. In fact, the *King's Inn* generated only 50% more calls than *Rumors*, and, when the "bar check" type calls are eliminated, the two businesses generated essentially the same number of calls, notwithstanding the fact the *King's Inn* is twice to four times the size of *Rumor's*.

Thus, the subject area and property had a moderate demand for police services, but not one that is, by any means excessive. Further the demand, particularly with respect to more serious matters, seemed to be generated by *Rumors* rather than by the *King's Inn*.

In comparison, the Conoco facility had 36 calls for service, including an assault, criminal damage to property and numerous drive away without paying for gasoline.

A.230

The area around *Pirate's Cove* had a pattern of calls for service similar to that of the subject area, except that there was also a domestic dispute and a call for harassing telephone calls. *Pirate's Cove* itself had 18 calls for service, including three calls for disturbing the peace, one violation of a restraining order, and one recovery of stolen property.

The pattern and subject of the calls is the **exact** opposite of the pattern alleged in the adult use "studies". The problems allegedly associated with Adult Uses were not found at the *King's Inn*, but were found at *Rumors* and *Pirate's Cove*.

Accordingly, there is no evidence that *King's Inn* has any adverse secondary effects related to increased demands for police services. Thus, and notwithstanding the recitals in

Ordinance 242, increased crime is not a proper predicate for the County's Adult Use Zoning Regulations.

A.232

14. PROPERTY VALUES

The last key, alleged adverse secondary effect of Adult Uses is declines in property values. To determine if this secondary effect is present in the Benton County property value data were obtained for the six study areas described above.

Property values, generally for the four year period from 1994 to 1998, were obtained from the Office of the County Assessor, based on public information available in this Office's files. [132] These data were analyzed by McLaughlin Consulting Services, Inc. to determine changes in property values around *King's Inn* and around the four control uses.

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[132] Benton County, County Assessor's Office, *Field Records* for the addresses studied. Foley, Minn., July, 1998.

The results of this Analysis are set out in full on the table on the following pages. In summary, the value of *King's Inn* did not change, while the value of the other control use changed 18.67%.

With respect to the study areas, property values in the vicinity of *King's Inn* increased 74.24%. Property values in the control use study area also increased, but only by 16.14%.

(It is noted that the attached analysis in the *King's Inn* area extends relatively far East, which has had an effect on the overall analysis. However, since these properties are across a body of water from the *King's Inn*, and given the lack of a barrier presented by a narrow water body, and the ability of sound to travel over water, the inclusion of these properties is

BENTON COUNTY PROPERTY VALUE ANALYSIS

BENTPV1
PAGE 1A
8/18/98

ADDRESS	1994	1995	1996	1997
SUBJECT AREA				
181 LITTLE ROCK R	$26,300	$28,500	$28,500	$28,500
205	$26,300	$28,500	$28,500	$103,900
231	$26,300	$150,000	$150,000	$150,000
255	$21,000	$23,500	$25,900	$111,500
281	$147,100	$161,800	$168,800	$150,900
305	$21,000	$23,500	$114,200	$119,900
355	$21,000	$23,500	$25,900	$28,500
371	$29,300	$30,000	$32,000	$32,000

BENTON COUNTY PROPERTY VALUE ANALYSI BENTPV1

8/18/98

ADDRESS	1998	CHANGE 94 - 98	% CHANGE 94 - 98
SUBJECT AREA			
181 LITTLE ROCK RD.	$196,100	$169,800	595.79%
205	$148,200	$121,900	427.72%
231	$157,500	$131,200	87.47%
255	$195,300	$174,300	741.70%
281	$182,600	$35,500	21.94%
305	$125,600	$104,600	445.11%
355	$28,500	$7,500	31.91%
371	$35,200	$5,900	19.67%

BENTON COUNTY PROPERTY VALUE ANALYSIS

ADDRESS	1994	1995	1996	1997
9435 BAYVIEW CT.	$90,900	$91,600	$91,600	$91,600
9445	$26,300	$28,500	$134,000	$143,000
9465	$151,700	$172,400	$172,400	$172,40(
9450 NW HWY 10	$230,700	$230,700	$230,700	$230,70(
9520 HEMLOCK NW	$54,300	$68,500	$77,000	$81,200
9530	$33,700	$37,100	$65,500	$65,500
9540	$37,100	$37,800	$41,600	$45,000
9550	$78,900	$86,400	$94,500	$97,900
9570	$35,500	$39,400	$43,300	$44,500
9580	$38,100	$41,900	$46,100	$48,900
9590	$25,500	$28,100	$31,700	$34,900
9600	$29,200	$30,900	$44,200	$52,900

A. 236

BENTON COUNTY PROPERTY VALUE ANALYSI BENTPV1
PAGE 1D
8/18/98

ADDRESS	1998	CHANGE 94 - 98	% CHANGE 94 - 98
9435 BAYVIEW CT.	$97,400	$6,500	7.10%
9445	$148,000	$121,700	427.02%
9465	$172,400	$20,700	12.01%
9450 NW HWY 10	$230,700	$0	0.00%
9520 HEMLOCK NW	$89,300	$35,000	51.09%
9530	$67,800	$34,100	91.91%
9540	$49,500	$12,400	32.80%
9550	$103,200	$24,300	28.13%
9570	$53,900	$18,400	46.70%
9580	$38,400	$300	0.72%
9590	$38,400	$12,900	45.91%
9600	$63,200	$34,000	110.03%

A-237

BENTON COUNTY PROPERTY VALUE ANALYSIS

BENTPV1
PAGE 1E
8/18/98

ADDRESS	1994	1995	1996	1997
9610 HEMLOCK NW	$56,900	$62,100	$65,900	$65,900
9760 HOLLY PLACE	$23,400	$22,900	$25,200	$25,700
9752 HOLLY PLACE	$28,500	$29,600	$32,600	$32,700
TOTALS/AVERAGES	$1,259,000	$1,477,200	$1,770,100	$1,958,000

BENTON COUNTY PROPERTY VALUE ANALYSI BENTPV1

8/18/98

ADDRESS	1998	CHANGE 94 - 98	% CHANGE 94 - 98
9610 HEMLOCK NW	$70,600	$13,700	22.06%
9760 HOLLY PLACE	$27,800	$4,400	19.21%
9752 HOLLY PLACE	$36,000	$7,500	25.34%
TOTALS/AVERAGES	$2,355,600	$1,096,600	74.24%

BENTON COUNTY PROPERTY VALUE ANALYSIS

ADDRESS	1994	1995	1996	1997
CONTROL AREA				
7275 NE RIVER RD	$279,100	$307,000	$331,200	$331,200
7355	$555,000	$595,000	$595,000	$572,800
7505	$84,400	$92,800	$94,200	$94,200
7555	$98,800	$105,800	$105,800	$111,100
7575	$72,500	$77,200	$77,200	$77,200
7620	$9,500	$9,800	$65,000	$65,000
	$1,099,300	$1,187,600	$1,268,400	$1,251,500

A.240

BENTON COUNTY PROPERTY VALUE ANALYSI BENTPV1
PAGE 2B
8/18/98

ADDRESS	1998	CHANGE 94 - 98	% CHANGE 94 - 98
CONTROL AREA			
7275 NE RIVER RD	$331,200	$52,100	18.67%
7355	$575,500	$20,500	3.69%
7505	$100,800	$16,400	19.43%
7555	$115,600	$16,800	17.00%
7575	$84,900	$12,400	17.10%
7620	$68,700	$59,200	623.16%
	$1,276,700	$177,400	16.14%

A.241

A.242

appropriate. Even if the two or three most Easterly properties were eliminated from the analysis, the property value increase would be 76% or 70%.)

For the overall unincorporated County, property values increased 35.70%, compared to 74.24% in the subject area and 16.14% in the control area.

Accordingly, there is no evidence that *King's Inn* has any adverse secondary effects related to decreasing property values. Thus, and notwithstanding the recitals in Ordinance 242, decreasing property values are not a proper predicate for the County's Adult Use Zoning Regulations.

A.243

15. ANALYSIS

15.1 Facial Considerations:

Ordinance 242 was adopted with the alleged predicates described in Chapter 9, above. However, as set forth in Chapter 9 and in the Appendices, these "predicate" documents are entirely lacking in evidentiary value, and have no probative effect whatsoever.

Specific research in the Benton County has also failed to reveal any adverse secondary effects related to *King's Inn*.

Therefore, the Benton County has no reason to believe, based on either other local government "studies" or on its own

experience, that Adult Uses cause adverse secondary effects.

With respect to the provisions of Ordinance 242, if there were a need for the Adult Use Zoning Regulations, their setback requirement from residentially zoned property would be reasonable, as would be the setbacks required from community uses. However, the required setback from hotels and motels (which is unusual, although not unique, [133]) bears no rational relationship to the legitimate exercise of the County's police power.

Because Benton County has no reason to believe that it needed Adult Use Zoning Regulations to combat the alleged adverse

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[133] The hotel/motel disqualified was originated by the nearby City of St. Cloud to make its one Adult Use non-conforming and Benton County apparently simply mimicked the St. Cloud ordinance in this regard.

A.245

secondary effects of Adult Uses, and because the County's Adult Use Zoning Regulations are in derogation of both the County's intentions with respect to its industrial areas, and of the inherent and acknowledged commercial nature of adult uses, the Adult Use Zoning Regulations are arbitrary and capricious on their face, and bear no rational relationship to the legitimate exercise of the County's police powers.

15.2 As Applied:

With respect to the application of the Benton County Adult Use Zoning Regulations to *King's Inn*, they are equally arbitrary and capricious. *King's Inn* is zoned B, the more intensive commercial Zoning District, and a district permitting Adult Uses. *King's Inn* is also in the urban expansion designation pursuant to the County's *Land Use Plan*.

A.246

It is undisputed that *King's Inn* is commercial in nature and was, until the amendments to the Adult Use Zoning Regulations was an entirely lawful land use. It is in an area of intensive service commercial land uses, interspersed with some spot zoned residential uses, but fronting on a major, divided, arterial highway, carrying a high volume of interstate and inter-regional traffic, and less local traffic.

As set out in Chapter 13, above, there is no extraordinary demand for police services at *King's Inn* or in its study area. Other particular land uses, and other study areas had significantly higher demands for police services than did *King's Inn* and its area, with no the sexually-related crimes reported anywhere.

A.247

As further set out in Chapter 14, above, *King's Inn* has had no adverse impacts on property values in its area, and is actually in an area where property values increased more than they did in the control area or in the County as a whole.

Accordingly, considering both the location and impacts of *King's Inn*, the application of the Benton County Adult Use Zoning Regulations to this business and site is arbitrary and capricious and not rationally related to the legitimate exercise of the County's police power.

PUBLIC HEARING

A.248 A

BENTON COUNTY BOARD OF ADJUSTMENT

RE: FILE NO. 403, KISMET INVESTMENT, INC., DBA KING'S INN

taken at

Henry's Banquet Center, 6774 Highway 25 Northeast

Foley, Minnesota

taken on

September 17, 1998

commencing at

approximately 7:00 p.m.

22

23

24 HUBER COURT REPORTING
NORWEST CENTER, SUITE 680
25 ST. CLOUD, MINNESOTA 56301
(320) 259-0824

..250

MR. BINNIE: "File Number 403, Kismet Investment, Incorporated also known as King's Inn, 9450 Highway 10, Rice, Minnesota, requesting a variance from Section 7.10.2A(1) requiring a 500 foot setback for an adult use from any area zoned R-1, R-2 and R-3. This property is located in a Business 'B' Business and Shoreland District. Part of Government Lot 7, Section 11, and Government Lot 1, Section 14, all in Watab Township."

The on-site inspection was made this afternoon by all Board members. This was tabled from last month's meeting. We would like to hear from the county staff report first.

CHAUNCEY: I have no further report.

MR. BINNIE: Okay. We now want relevant information from the applicant. State your name.

MR. TIGUE: My name is Randall Tigue. I'm an attorney representing Kismet Investors. I guess I have a couple of procedural points before we begin the information.

First is I've been advised by my clients that the Board's inspection of the subject property consisted of walking around in the parking lot and not entering the building. And since virtually all

A.252

with one small exception to the claimed hardship relates to the conditions of the interior of the building, I'd like to inquire as to why the Board did not inspect the interior of the building.

Mr. Keller advises me that there were several staff there prepared to show the Board the interior of the building and particularly the areas that -- of which there was claimed hardship, and the Board did not see fit to examine the interior of the building.

MR. MAIER: Mr. Chairman, may I answer that?

MR. BINNIE: Yes.

MR. MAIER: As I recall, we did inspect the property a month ago. And almost all -- It's my recollection anyway, most of the members or

almost

all of us did visit the inside of this establishment and waited 10, 15 minutes for people to arrive at that time, so we did have a look at the inside.

MR. BINNIE: Thank you, Ed.

MR. TIGUE: The second point I would make is that I raised the issue at the last meeting, and I raised the letter of the county attorney in between meetings. It's our position to have a full and fair hearing and to accord with procedural due process

required under Swanson versus Sigmund Bloomington (phonetic) and other case law that witnesses of this proceeding should be under oath and subject to cross-examination by all parties. And we would reiterate that request for the record here today.

MR. BINNIE: We will not abide by that ruling. I am the chairman and I will ask all the questions of these people that deem necessary. We will not have cross. Thank you.

MR. TIGUE: Before I ask Mr. Keller to speak, I'd like to give you just a brief summary of the items that we're going to talk about concerning hardship and other criteria. I'm going to ask Mr. Keller to talk about the hardships.

We do have a video that we will show you concerning the issue of hardships. I have a planner,

Mr. R. Bruce McLaughlin, to discuss the criteria of whether the proposed use is prohibited in the zoning district, whether it is in harmony with the general purposes of the intended ordinance, whether it's in harmony with the comprehensive plan, and whether -- and the other criteria concerning the granting of the variance.

My first person I'd like to introduce you to is Mr. Keith Keller. Mr. Keller, could you step

close to the microphone, so you can be heard.

BY MR. TIGUE:

Q Mr. Keller, could you state your name and address for the record?

A My name is Keith Keller, 9450 Northwest Highway 10.

Q And Mr. Keller, what is your relationship to Kismet Investors, Inc.?

A I am the owner.

Q And Kismet Investors operates the King's Inn of Rice; is that correct?

A That's correct.

Q And when did Kismet Investors first purchase the business known as the King's Inn of Rice?

A January 2, 1997.

Q And for what purchase price did you pay for the

business?

A.257

A 300,000.

Q And did Kismet Investors subsequently acquire the real estate in which the King's Inn of Rice is located?

A Yes, we did.

Q And when did you do that?

A January 8, 1998.

Q And did you purchase outright a contract for deed, or what were the terms of the purchase?

A $250,000 purchase price. $50,000 down and a contract.

Q Now, when you purchased both the business and the building, was the physical condition of the building essentially the same as it is now?

A Yes, it is.

Q Now, you have a list of noteworthy physical features in the building. Did you prepare a video that showed the -- that accurately depicts the condition of the building and its proximity to its neighbors?

A Yes, we did.

MR. TIGUE: With the Board's permission, I'd like to play the video and pause it at the moment and add Mr. Keller's comments upon the status of what you're seeing in the video. I don't know if we can set it up in a different manner that will enable

everyone to see it.

MR. BINNIE: Are we okay with this? Do I have any comment from the Board? Are we viewing this videotape to show the condition of the building?

MR. MAIER: How long is it?

MR. TIGUE: It's about four or five minutes.

MR. CEKALLA: Mr. Chair, at the previous meeting we tabled last month, the owner presented

photos of the building. And I don't know if we feel that photos are adequate. I have no objection to the video. I don't know what -- you know, what's all on the video, actually.

MR. BINNIE: We're definitely going to be very lenient here. Let's see it.

MR. TIGUE: Let me ask you this: Is there some other way we can position this so it would be easier for you to see? I think it's probably difficult for you to see that.

MR. BINNIE: Is this pretty much for the Board to see?

MR. TIGUE: That's for the Board to see.

MR. BINNIE: Okay. Turn it so the Board can see it. We will comment on it.

BY MR. TIGUE, CONTINUING:

Q What are we looking at now?

A That's the front entrance of the parking lot as you're entering the King's parking lot.

MR. TIGUE: Now, can you back up a minute? Back it up for a second.

(Technician complies.)

MR. TIGUE: Hold it right there.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q Now, looking down that road, is that -- The end of that road is where the next adjacent house to King's Inn is located (indicating)?

A Yes, that's the next home.

Q Does this video accurately depict how far away the next house is from King's Inn?

A Yes.

MR. TIGUE: Keep going.

(Technician complies.)

MR. TIGUE: Okay. Stop right there.

(Technician complies.)

MR. TIGUE: Back up a little bit.

(Technician complies.)

MR. TIGUE: Roll forward.

(Technician complies.)

MR. TIGUE: Stop.

BY MR. TIGUE, CONTINUING:

Q Does this show the distance from the other adjacent house to King's Inn?

A Yes, it is behind those trees there (indicating).

MR. TIGUE: Now keep going forward.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q And this is the front entrance to King's?

A Yes, it is.

A. 264
~~X. 224~~

Q This is another view of the house that we talked about?

A Right.

MR. TIGUE: Okay. Hold it right there.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q Now, I want to direct your attention to the roof on the King's Inn and the shape of the roof on the King's Inn. Do you happen to know why the roof is a shaped like that?

A Yes, that's to accommodate the domed inner ceiling. It accommodates the dance floor.

Q And is that -- Was that especially inserted into the building to accommodate an adult entertainment business?

A Yes. Complete custom-domed built underneath that for

the stage area.

Q Okay. Now, in order to put that custom dome in, did you have to change anything with the ventilation system that was there for the old restaurant that was there?

A Basically, everything was restructured from the ventilation, the heating, air conditioning vents, air catchers, air cleaners, everything, smoke eaters.

Q Okay. Having removed the ventilation system that was

there as a restaurant and the air conditioning, soot catchers and all of that, is there any way that this building could be used as the full-service restaurant that it was before?

A No.

Q And why is that?

A Everything's been accustomed and accommodated just for the dance stage area, sound system, and so forth.

MR. TIGUE: Okay. You can roll the video some more.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q Oh, and do you know what the cost is for redesigning the roof and the ventilation and the heating and the air condition system?

A Approximately a hundred thousand dollars.

Q Okay. Now, could you mention something about the lighting that you have in the parking lot?

A Basically, all the lighting around the sides there, the front of the building, and on the other side there, they're illuminated lights (indicating). Lights up the whole parking lot, which is all -- again, all custom.

Q Okay. Now, what are we looking at here?

A Basically, this is the entrance of the building --

MR. TIGUE: Why don't you freeze it right here.

(Technician complies.)

A -- as you walk in. That's the dance area.

Q Okay. And that stage there, is that a stage that's usable for other purposes other than adult entertainment?

A No, it is not.

Q What is the cost of that stage?

A Stage is approximately $63,000. It's all been custom-made in height with the stairs over the dance floor left there to go up, the shape, the lighting. The poles there are sunk into the ground. It goes up underneath that stage. The structural part of that building, there used to be a wall that came

acrossed. It was a brick wall. And it has all been torn down. And all that underneath was already constructed.

Q And again, is this stage usable for any purpose other than adult entertainment?

A No.

MR. TIGUE: Continue rolling the tape, please.

(Technician complies.)

MR. TIGUE: Why don't you stop right here.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q First, let's look at the shape of the ceiling there. Why is the ceiling in that shape?

A Because you see that's the domed area we're talking about from the outside. It's pitched on both sides. In the center area is where we would handle all the lighting, speakers, sound system, security system, surveillance system, all the monitoring. Everything is custom-built and wired.

As you see, those speakers are flat speakers there on the sides. And those are all custom-wired through the whole building, through the roof, and through the whole area of the building back into the offices.

Q All right. Okay. First, let's take a look at those -- the items that are -- appear to be kind of circular or cone objects that appear to be lined up along the side there (indicating). What are those?

A That's all lighting cans that are custom through the DJ booth and are placed in different areas to illuminate the area to the best effect.

Q All right. And the square or rectangular black objects on the side, what are those (indicating)?

A Those are custom-made input speakers. They're inside that dome that give that dome the proper sound for the entertainment.

Q Okay. And again, what would be -- What is the cost of installing this internal dome, lighting system, speaker system into this establishment?

A From what we understand, it's over 80,000.

Q And again, are -- Is this type of system usable for any other purpose other than an adult entertainment establishment?

A No, it is not. It is all custom.

MR. TIGUE: All right. Could you continue with the video.

(Technician complies.)

UNIDENTIFIED AUDIENCE MEMBER: I thought this video was supposed to be only four minutes

long.

MR. TIGUE: Pardon me, Mr. Chairman. I had to endure these kind of rude interruptions the last time. And I'd ask for the ruling that if people are going to act this way, that they be requested to leave.

Stop for a minute.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q What is that right there (indicating)?

A That's just one of the eighteen surveillance cameras that have been like custom-built and wired through the entire building.

Q All right. And what is the purpose of surveillance cameras?

A Basically, surveillance for everything; monitoring employees, dancers, customers, security. We have a 24-hour surveillance system that goes around the clock. We are open late hours, so basically a security system there that we can monitor everything and anything.

MR. TIGUE: Continue with the tape then.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q And the security system that you put in for the

purpose of monitoring an adult entertainment establishment, what is the cost of that security system?

A Approximately 43,000.

Q Now, in this part of the -- In this part of the video -- Let's wait until we get a better picture of it here.

MR. TIGUE: All right. Let's stop it right here.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q You have a 2-level floor right here where dancers perform on the couches. Is that -- Is that again a -- that kind of division something that's unique to an adult entertainment establishment?

A Yes, that is all custom-built and it's a upper level where the rails are there and separates that from the main floor.

Q And would that pose any difficulties if it were used as a full-service restaurant?

A Yes.

Q What is that?

A Trip.

MR. TIGUE: Can you continue rolling the film.

(Technician complies.)

BY MR. TIGUE, CONTINUING:

Q And again, it's another one of the surveillance cameras you talked about before. Now, is there anything in particular, unique, about the tables there?

A Yeah. Actually, those tables are all custom also not to handle food. Basically, a girder or something would need to be put up. A full menu -- A full three

or four people -- It wouldn't even handle two people.

Q Where are we now? Why don't you describe where we are right now.

A All right. That's the total custom DJ booth area. You can see how it's manufactured to fit in there perfectly, very sophisticated system, wiring all through the underneath -- which runs underneath the stage, up above all the speakers, through the top part of the walls, which can be used actually for nothing else than for what it's being used for right now.

Q And again the DJ booth system and the wiring through everything above, what does that system cost?

A Approximately 50,000.

Q And all of these -- Again, is a building with these custom designs usable for any other purpose other

than adult entertainment?

A Absolutely not, no.

Q Now, apart from performing -- Apart from the fact that the building is not usable for any other purpose, can you describe something of the things that King's Inn contributes regularly to the surrounding community?

A Basically, we donate to the sheriff's department. Athletics, we sponsor St. John's soccer team. They

are currently second in the nation for soccer. St. Cloud wrestling, the football team, we've hired a lot of people on both teams, softball teams, motorcross (phonetic), snowmobiling. We have an area cattle feed program that we're involved with also right now.

MR. TIGUE: I believe that's all I have for Mr. Keller. If the Board has any questions?

MR. BINNIE: Thank you. It's very complete.

MR. TIGUE: Next, I'd like to call Robert Bruce McLaughlin to step forward.

BY MR. TIGUE:

Q And would you provide your name, address, and occupation.

A Mr. Chairman, I'm Robert Bruce McLaughlin; and I'm

Supreme Court, U.S.
FILED
MAR 15 2001
OFFICE OF THE CLERK

No. 00-1305

In the

Supreme Court of the United States

Kismet Investors, Inc., a Minnesota Corporation,

Petitioner,

vs.

The County of Benton, Minnesota,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court and the Minnesota Court of Appeals properly determined that the presence of a hundred potential sites for adult uses in Benton County constitutes "sufficient alternative avenues of communication."

2. Whether the trial court and the Minnesota Court of Appeals properly granted summary judgment on the question of whether the Benton County adult use ordinance is "narrowly tailored."

3. Whether the trial court and the Minnesota Court of Appeals properly rejected the claim that the Benton County Development Code's failure to quantify the precise number of parking spaces required at Petitioner's nude dancing establishment means that the county has enacted an impermissible prior restraint of speech or rendered identified sites unavailable.

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While the Petitioner has included in its appendix two separate orders of the trial court, dated July 1, 1999 and December 27, 1999, and provided to this Court the decision of the Minnesota Court of Appeals upon which the Minnesota Supreme Court denied review, Petitioner has failed to provide in its appendix a copy of a related order, dated April 2, 1999, wherein the trial court decided various zoning matters in favor of Respondent. Accordingly, this related order is provided in Respondent's Appendix at 1a.

STATEMENT OF THE CASE

Since the early 1990's Petitioner has operated a nude dancing establishment known as "The King's Inn" in rural Benton County. When the establishment first opened in a location that had previously been used as a restaurant, Benton County had no contemporary adult use ordinance in place. After unsuccessfully attempting to enforce its conditional use permit ordinance to regulate the business, Benton County set forth on a lengthy process that lead it to adopt a contemporary adult use ordinance--an ordinance designed for the specific purpose of minimizing the adverse secondary effects of adult businesses.

A. Benton County's Review of Adverse Secondary Effects Caused by Adult Uses and Adoption of Ordinance.

The process leading to the adoption of the adult use ordinance was deliberate and measured. Between June of 1993 and July of 1994, adoption of an adult use ordinance was discussed at more that a half-dozen meetings of the County Board and County Planning and Zoning Commission. Pet. App. 28a-31a. During these meetings county officials

reviewed studies discussing the adverse secondary effects, including studies from the following communities: St. Cloud, Minnesota; Phoenix, Arizona; Adams County, Colorado; St. Paul, Minnesota; Indianapolis, Indiana; Los Angeles, California; Amarillo, Texas; and Austin, Texas. Pet. App. 87a. County officials also reviewed a report of the Minnesota Attorney General that dealt with the regulation of adult businesses and discussed adverse secondary effects related to adult businesses.

No representatives of Petitioner's business participated in the public process of consideration and adoption of the adult use ordinance. Minutes of the various meetings reflect that no evidence was offered to rebut a wealth of evidence put before county officials, all of which suggested that numerous adverse secondary effects are associated with adult uses. Pet. App. 31a.

The ordinance that was adopted by Benton County followed a familiar path: limiting adult use locations to commercial and industrially zoned areas and providing setbacks from residentially zoned areas, schools and churches. Pet. App. 94a-95a. The ordinance provided for a 500 foot setback from these residentially zoned areas. Because the Petitioner's establishment was only about 150 feet from a residentially zoned area, it was nonconforming. Pet. App. 32a-33a. The adult use ordinance contained an amortization provision, requiring "The King's Inn" to come into conformity within four years, by July 31, 1998.

B. Petitioner Requests a Variance from Ordinance Provisions and Hearing is Held on Variance Request.

"The King's Inn" took no steps to challenge any portion of the ordinance until nine days prior to the expiration of the amortization period, July 22, 1998. At this time Petitioners applied for a variance from the amortization period. Pet. App.

33a. In connection with the request for a variance, the Benton County Board of Adjustment, outside of the hours of operation for the business, inspected the property to determine its suitability for other uses. A hearing was also held in connection with the variance request. The hearing dealt with issues pertaining to the propriety of a variance. Resp. App. 20a-32a. While several nude dancers and the facility's owner testified on behalf of the variance request, neighbors testified that the establishment interfered with the enjoyment and use of their property. Resp. App. 24a-32a. One adjacent resident testified that patrons of the establishment damaged his property and engaged in verbal abuse, yelling and screaming in the parking lot adjacent to his residence. Resp. App. 24a-25a. Others spoke of problems and potential problems related to drug and alcohol use by those visiting the establishment. Another resident in the immediate area of the establishment related shocking details of threats from the establishment's owner. These threats included threats to her husband's physical safety; threats of gang violence; threats to run her family out of its home; threats to hurt her children; and threats to rape her. Resp. App. 28a-29a.

A wealth of public discussion took place at this meeting concerning the feasibility of using the restaurant for other purposes--an issue that relates primarily to whether a variance should be granted. Resp. App. 28a-32a. In addition to the testimony regarding the specific outrageous conduct by the owner of the establishment and other impositions on the neighboring residences, several citizens also testified regarding the adverse secondary effects that generally accompany adult businesses. Resp. App. 21a-32a. The variance was denied and this suit followed.

C. Procedural History.

The suit was initially bifurcated. The trial court first dealt with the issues relating to a variance appeal. The court, by

order and detailed findings and conclusions dated April 2, 1999, resolved the zoning and injunction issues in favor of Respondent. Resp. App. 1a-19a. The court then proceeded to the merits of the constitutional challenges advanced by Petitioner in connection with subsequent motions.

The majority of the constitutional issues were decided by the trial court's second order, dated July 1, 1999. The trial court specifically found that Benton County had complied with requirements set forth by this Court in Renton v. Playtime Theatres, 475 U.S. 41, 46 (1986):

> Benton County relied upon numerous studies which reviewed adult use and sexually-oriented businesses, both within Minnesota and outside of it and in both rural and urban settings. Those studies identified specific adverse secondary effects attributable to adult use businesses and it is reasonable for Benton County to have relied upon them in establishing their ordinance. The studies examined reasonably similar businesses which provided the commission and the Benton County Board sufficient information to enact the ordinance.

Pet. App. 68a. The court also rejected the contention that Petitioner's criticism of the studies relied upon rendered the Benton County adult use ordinance unconstitutional:

> The county enacted the ordinance on the strength of thorough research, documented studies, public hearings and considered deliberations. As the new studies and evidence were not before the commission or the Benton County Board at the time of the enactment of the ordinance, they were not part of the commissioners' or the Board members' deliberations.

Pet. App. 69a. The court went on to rule that a trial was required on the sole issue of whether the ordinance allowed sites to which adult businesses might locate so that there were "sufficient alternative avenues of communication." Renton, 475 U.S. at 54.

The trial of the matter was held on November 12, 1999. Respondent called one witness, Ronald Peterson, the Benton County Development Director. Peterson testified that there were 101 sites available for adult uses in the commercial and industrial zoned areas of Benton County. The trial court found that Peterson was a credible witness. Pet. App. 33a.

Petitioner called two witnesses. The trial court found that the testimony of each of these witnesses was not believable. Pet. App. 34a. Robert McLaughlin, an expert witness called by Petitioner, argued that none of the 101 sites identified by the county were available because the county had parking requirements for development and that if these parking requirements were interpreted in a whimsical manner then none of the sites would be available. Id. The trial court rejected McLaughlin's opinions and his conclusions with respect to this issue. Id. The testimony offered by Petitioner's second witness, an adult business owner who owned adult businesses in Wisconsin, was held by the court to be irrelevant because of his lack of familiarity with building regulations in Benton County. Id.

The trial court found that one of the 101 sites identified by Respondent was not available, but that the 100 sites that were available provided sufficient alternative avenues of communication. Pet. App. 35a. The court also rejected the contention that the parking provisions of the Benton County ordinance rendered sites unavailable. Pet. App. 36a. In its memorandum accompanying the order, the court noted that Petitioner's fear of unreasonable enforcement of parking requirements was unfounded:

> Plaintiff finally contends that all the sites are legally inadequate because they are available only in the discretion of the governmental officials of Benton County. The substance of Plaintiff's argument is changing from a current industrial or commercial use to an adult use would trigger a zoning review and the county could require off-street parking spaces "as determined by the County Planning Commission."... Plaintiff argues that this "unbridled discretion" could be used to impose impossible to provide parking requirements, thus preventing location of an adult business.
>
> This argument is unfounded in fact and highly speculative in outcome. Many of the identified sites are large enough to accommodate any reasonable parking requirements. Counties are required by statute to act on zoning matters within 60 days of a request.

Pet. App. 45a. The court went on to note that any arbitrary or capricious decision by county personnel could be promptly reviewed. Pet. App. 45a-46a.

Petitioner then appealed to the Minnesota Court of Appeals, which affirmed the trial court's ruling in favor of Respondent. Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85 (Minn. Ct. App. 2000). In its opinion the Minnesota Court of Appeals, after first addressing the merits of the zoning appeal, which is not now before this court, relied heavily on this Court's decision in Renton and found that Benton County's Adult Use Ordinance passed constitutional muster under the test set forth in Renton. Pet. App. 17a, 20a, 23a.

The Minnesota Court of Appeals also rejected Petitioner's assertion that the Benton County Development Code might be interpreted in a manner that would permit

county officials to deny a land use permit to a prospective adult use establishment on the theory that the establishment did not have enough parking spaces. Pet. App. 22a. The court distinguished the situation before it from those situations where adult use ordinances make the ability to operate an adult use ordinance contingent on discretionary approvals by the government officials, and specifically held that these parking regulations did not inhibit Petitioner's right to operate an adult use establishment. Id.

Petitioner then petitioned for review before the Minnesota Supreme Court. Review was denied by order dated November 15, 2000. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

I. RESPONDENT'S ORDINANCE IS "NARROWLY TAILORED" PURSUANT TO RENTON AND THIS CASE DOES NOT PRESENT FACTS THAT WOULD SUPPORT THE CONTENTION THAT NO ADVERSE EFFECTS WERE CAUSED BY PETITIONER'S OPERATIONS.

Respondent asserts that Benton County's ordinance is not "narrowly tailored" and is therefore unconstitutional. This argument ignores controlling precedent of this Court. Proper analysis of the constitutionality of an adult use ordinance under Renton depends on consideration of the following requirements: the ordinance must be content-neutral; it must be designed to serve a substantial governmental interest; and it must not unreasonably limit alternative avenues of communication. Renton, 475 U.S. at 47-49. Here Benton County's numerous meetings investigating the adverse secondary effects caused by adult businesses and its consideration of a wealth of studies examining the effects of such businesses compel the conclusion that Benton County made the showing required by Renton.

The assertion that the Benton County ordinance is not "narrowly tailored" fails upon a careful reading of Renton. When an ordinance is enacted so as to address adverse secondary effects attributable to a particular category of adult businesses, the ordinance is tailored to regulate that category of businesses and is "narrowly tailored." Renton, 475 U.S. at 52.

The notion that Petitioner's business should be exempted from consideration as an adult use responsible for adverse secondary effects should be rejected. The record in this matter included evidence that the presence of this particular business was causing harm and aggravation to neighboring residents. Resp. App., 24a-29a. Thus, even if this court were to create a "good neighbor" exception to the criteria stated in Renton, this would not be the case to do it. Further, the self-serving testimony of an expert discredited by the trial court's finding that the expert was not credible, hardly constitutes a proper occasion for examination of whether this Court should expand upon the clear directives provided in Renton.

II. THE PROVISIONS OF THE ORDINANCE AMORTIZING NON-CONFORMING ADULT USES ARE CONSTITUTIONAL.

Petitioner contends that the Benton County Adult Use Ordinance is unconstitutional as a result of its amortization of non-conforming adult uses. This argument ignores a wealth of precedent granting governments the right to amortize non-conforming adult uses. Amortization provisions have been upheld by both state and federal courts in Minnesota as long as the amortization period is reasonable. Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993); Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991); Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968). Other federal courts have uniformly permitted amortization of existing non-conforming

adult businesses as long as the amortization period is not punitively short. See David Vincent, Inc. v. Broward County, Florida, 200 F.3d 1325 (11th Cir. 2000); Ambassador Books & Video, Inc. v. City of Little Rock, Ark., 20 F.3d 858, 865 (8th Cir.1994); SDJ v. City of Houston, 636 F.Supp. 1359, 1370 (S.D.Tex.1986), aff'd, 837 F.2d 1268, 1278 (5th Cir.1988)). Benton County's amortization provision was a full four years in duration and compares favorably with the duration of other amortization provisions that have been upheld. See Ambassador Books, 20 F.3d at 865 (three-year amortization provision valid); Alexander, 928 F.2d at 280 (two-year amortization provision valid).

Plaintiff's argument regarding amortization seems to be that while the amortization provision may have been reasonable at the time it was enacted, the history of the site during the amortization period should stand as evidence that this particular location's operation leads to no adverse secondary effects. Of course, as discussed above, the record here shows that there were adverse secondary effects associated with the business between the time the ordinance was passed and the time the amortization period expired. Apart from this, Petitioner's argument calls for governmental entities who have found adverse secondary effects to exist with respect to certain categories of adult uses to wait until specific adult businesses actually result in harm to the community before they can take action. Municipalities are not required to wait until the adverse effects of businesses are felt before adopting measures for the public good. Instead, the proper constitutional inquiry is limited to whether the ordinance is "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton 475 U.S. at 50. The notion that "good behavior" by an adult use during an amortization period can render the ordinance unconstitutional runs contrary to the jurisprudence of this court. Such a notion also is contrary to common sense, since it would require a

governmental entity to actually permit adverse secondary effects before enacting measures to avoid them.

III. GENERAL PARKING PROVISIONS OF BENTON COUNTY'S DEVELOPMENT CODE APPLICABLE TO ALL BUSINESSES DO NOT RENDER THE ADULT USE ORDINANCE UNCONSTITUTIONAL SIMPLY BECAUSE PETITIONER CAN INVENT A FANCIFUL INTERPRETATION THAT WOULD RENDER SITES UNAVAILABLE.

Petitioner last advances the argument that provisions of the Benton County Development Code that impose routine parking requirements on all properties render the sites identified by the county unavailable. All businesses in Benton County are required to abide by a provision of the Benton County ordinance that states:

> (c) Required off-street parking spaces shall be provided as determined by the County Planning Commission.

Benton County Development Code, section 9.2.1 (c). Resp. App., 33a. The ordinance then goes on to specify parking location requirements and design requirements in sections 9.2.3 and 9.2.4. Resp. App., 34a-35a. Petitioner's complaints relating to discretion are not in this instance a direct challenge to the Benton County ordinance provision that Petitioner contends vests excessive discretion in public officials. The sole issue that remained for trial after the court's first two orders was whether or not Petitioner was presented with "reasonable alternative avenues of communication." Petitioner thus could not directly challenge the parking ordinance or the land use permit ordinance. Further, Petitioner does not want its complaints relative to these provisions to be seen as direct constitutional challenges. If the parking

ordinance provisions, wholly separate from the adult use ordinance, were unconstitutional, this would simply mean that they would not be enforceable against adult uses in Benton County and the effect of such a ruling would be to remove any impediment to availability created by the provision found to be unconstitutional.

There is no question that a court ruling invalidating the parking requirements would not affect the vitality of the wholly separate and unrelated adult use provisions of the code. Section 12.1.2 of the code provides:

> If any court of competent jurisdiction shall adjudge any provision of this ordinance to be invalid, such judgment shall not affect any other provisions of this ordinance not specifically included in such judgment.

Resp. App. 36a. Petitioner's complaint with respect to the parking ordinance is not and cannot be that it is unconstitutional, since such an argument would both exceed the scope of the issues litigated and be of no avail to Petitioner.

The Minnesota Court of Appeals addressed and properly rejected Petitioner's argument with respect to the requirements of the parking ordinance. The court first recognized that zoning provisions that allow adult uses only at the unfettered discretion of a locality violate the First Amendment, citing the very authority now cited by petitioner, Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1361-62 (11th Cir. 1999), cert. denied, ___U.S.___, 120 S.Ct. 1554 (2000). Pet. App. 22a. The court then also acknowledged that a licensing scheme or a scheme that permitted an adult use to operate only upon obtaining a discretionary zoning exception precluded reasonable alternative avenues of communications. Id. But the court noted that the Benton County parking requirements do not

give county officials discretion to deny Kismet's ability to operate an adult use in Benton County and thus are distinguishable from the cases cited by Petitioner. Id.

In contrast to those ordinances where adult use licensing requirements have been successfully challenged, Benton County's ordinance does nothing to target adult businesses with respect to any of the areas of discretion discussed by Petitioner. The parking provisions of which Petitioner complains do not target adult businesses and must be complied with by all landowners in Benton County.

Petitioner's argument that parking regulations might be used to keep out adult businesses is without merit. Petitioner argued below that there is no grid or table that can be referred to which tells property owners the precise number of parking spots that they must provide. Petitioner has voiced the fear that Benton County will use the parking lot regulation to require excessive numbers of parking spots. Even if Benton County required three or four times the number of parking spots that the Petitioner's establishment presently provides, numerous parcels would still be available given that some of the parcels are dozens of acres in size and most are several acres in size. Pet. App. 45a. Most of the parcels identified by the county at trial would accommodate parking requirements even if the parking regulations were interpreted in a very stringent manner. Id.

It is apparent from Petitioner's arguments that it is concerned not only that they might be required to provide three or four times as much parking as is currently used at the King's Inn, but that it even fears that the county might require 100 times (or some other ridiculous amount) the number of parking spots that are presently used and thereby render all of the identified parcels unavailable.

If the county were to take such an arbitrary and capricious position with respect to the parking lot requirements, Petitioners would not be without a remedy. Decisions of the County Planning Commission are appealable

as of right to Minnesota courts through writ of certiorari. Minnesota statute provides that where no right of judicial review is provided, there is a right to petition for a writ of certiorari. Minn. Stat. § 606.01. Review by writ of certiorari is available whenever there is no precise mechanism for review defined in the statute or ordinance. Shetka v. Aitkin County, 541 N.W.2d 349, 354 (Minn. Ct. App. 1995), review denied (Minn. Feb. 27, 1996); Neitzel v. County of Redwood, 521 N.W.2d 73, 76 (Minn. Ct. App. 1994), review denied (Minn. Oct. 27, 1994). Upon review by writ of certiorari, any decision that is "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it" will be reversed. Dietz v. Dodge County, 47 N.W.2d 237, 239 (Minn. 1992); Scott County Lumber v. City of Shakopee, 417 N.W.2d 721, 727 (Minn. Ct. App. 1988), review denied (Minn. Mar. 23, 1988). The availability of the writ of certiorari in the Minnesota courts assures that any arbitrary or oppressive decision by the county is subject to meaningful judicial review.

Moreover, Petitioner need not be concerned that the County might fail to decide parking lot issues so as to effectively deprive Petitioner of the ability to open an adult use establishment. Minn. Stat. § 15.99, subd. 2 requires counties to issue prompt decisions with respect to matters that are brought before them. It provides:

> Except as otherwise provided in this section and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems . . . or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request. If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.

Minn. Stat. § 15.99, Subd. 2. This statute operates to assure that the county will make its determination on matters brought before it within 60 days.

Petitioner's concerns regarding parking lot requirements are simply unfounded. If a large number of parking spaces are required, Petitioner is still able to purchase property and open an establishment that will accommodate any amount of vehicles that might reasonably be required by the County. If the County acts in an arbitrary and capricious manner, Petitioner has a mechanism for review and will obtain a prompt determination with respect to the issue. For these reasons, the sites identified are available so that Petitioner does have "reasonable alternative avenues of communication" and the decisions of the lower courts on this issue should stand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 15, 2001

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STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF BENTON SEVENTH JUDICIAL DISTRICT

Kismet Investors, Inc., a Minnesota corporation,	)	Court File No. CO-98-1240
Plaintiff,	)	
	)	**FINDINGS OF FACT**
v.	)	**CONCLUSIONS OF LAW AND**
	)	**ORDER FOR JUDGMENT**
County of Benton,	)	**AND JUDGMENT**
Defendant.	)	

The above-entitled matter came before the Honorable James W. Hoolihan, Judge of District Court, on the 9th day of March, 1999.

Randall D.B. Tigue, Esq., appeared on behalf of the Plaintiff, Kismet Investors, Inc.

Kenneth H. Bayliss, Esq., appeared on behalf of the Defendant, County of Benton.

This case is an appeal from the denial of a variance by the Benton County Board of Adjustment. Plaintiff requests a temporary injunction and a temporary restraining order to prohibit the Defendant from taking any action, civil or criminal, to enforce the provisions of Benton County Ordinance No. 242 against the Plaintiff. The parties have agreed to bifurcate the issues raised in the Complaint and have the Court determine at this time, in conjunction with the motion for a temporary injunction, the issue of whether the denial of a variance by Benton County Board of Adjustment was wrongfully determined. The constitutional and damage issues are reserved.

Now, having considered the arguments of counsel, the documents and proceedings herein, together with the applicable law, this Court makes the following:

FINDINGS OF FACT

1. In 1994, the Benton County Board of Adjustment (Board) adopted as part of the Benton County Development Code, Ordinance No. 242 which prohibits, after a four-year amortization period, adult use businesses from operating within 500 feet of residentially zoned areas. Adult businesses are allowed to operate in B, B-2, I-1 and I-2 zones. Plaintiff's business is lawfully in a B zone.

Benton County Development Code, 7. 10. 3, states:

> Adult uses established prior to the enactment of Benton County Ordinance 235 shall be permitted and regulated as nonconforming uses until July 31, 1998 at which time such uses shall become unlawful.

Benton County Development Code, 7.10.2 states:

> No adult use shall be located within five hundred (500) feet of:
>
> 1. Any area zoned R-1, R-2, or R-3. [residential areas]

2. The Plaintiff, Kismet Investors, Inc., a Minnesota corporation, has operated a business known as "King's on the Lake," in Benton County since January 2, 1997. The Plaintiff purchased said business in January of 1997 and subsequently purchased the real property, which is the subject of this action, one year later in 1998 for approximately $250,000. The business features live, dance entertainment which the

parties have variously described as "non-obscene", "nude" and "cabaret" dancing and is currently doing business as "The King's Inn."

3. The Plaintiff's business property is located approximately 150 feet from the nearest residence. The residence is lawfully located within a residentially-zoned area.

4. On July 22, 1998, Plaintiff applied for a variance from the Board to continue operations after the end of the amortization period. The application was received by the Board approximately nine (9) days prior to the end of the amortization period.

5. Hearings on the request for a variance were held by the Board on August 20, 1998 and September 17, 1998. The board members made a physical, on-site inspection of the property prior to the August 20, 1998 hearing.

6. On August 20, 1998, the Board held a public hearing for consideration of the Plaintiff's request. The Plaintiff presented information from a planning review performed by the Plaintiffs consultant, R. Bruce McLaughlin. Plaintiff presented information regarding the cost of improvements which were made to the property and claimed it would suffer hardship if the variance request was not granted. The Board decided to table the request to the next scheduled Board meeting, study and examine the information provided to it and schedule a second on-site inspection of the property.

7. The Board inspected the property a second time before the September 17, 1998 meeting to reconsider the application for a variance from the Plaintiff.

8. The Board met on September 17, 1998 to consider the variance application of the Plaintiff. A public hearing was again held and the hearing was recorded. A verbatim transcript from the hearing was produced. The Plaintiff gave a presentation to the Board through its attorney, Randall Tigue. Plaintiff presented testimony from its owner, Keith Keller, a video tape of the property and the testimony of

witnesses, including some of the employed dancers from "The King's Inn." Plaintiff also presented the planning review from its expert, R. Bruce McLaughlin.

9. The Board heard from several members of the public concerning the granting of the variance for continued operation of the adult business. At least twelve (12) members of the public spoke in opposition to the granting of the variance. They gave testimony regarding the alternative uses of the property; the lack of hardship for the business property if the variance was not granted; disturbances allegedly caused by the business to the residential area; prior alternative uses of the property; the reduction in property values and rates of appreciation in the area; the validity of setbacks and secondary negative effects of the business; criminal behavior and drug use at the location of the business; alleged threats of violence upon adults and children of family residents in the area directly connected to the variance issue; and safety concerns of residents regarding the business.

10. At the conclusion of the September 17, 1998 meeting, the Board denied the requested variance and on October 15, 1998 issued written findings on the separate factors required for granting the variance. The Board specifically found that the Plaintiff proposed to continue to operate an adult use facility after the conclusion of the amortization period. They also found:

a) the proposed use is adult use, and is not prohibited in the business district in which it is located;
b) the variance would not be in harmony with the general purposes and intent of the Ordinance;
c) the Plaintiff had not demonstrated a hardship;
d) the concerns of the Plaintiff were solely economic;
e) the property could be put to an alternative reasonable use;

f) the Plaintiff failed to demonstrate a plight that is due to circumstances unique to the property;
g) the Plaintiff purchased the property with constructive knowledge of the Ordinance;
h) the variance, if granted, would alter the family neighborhood character of the locality.

CONCLUSIONS OF LAW

Benton County Board of Adjustment's decision denying the variance application

1. The role of the judiciary in countermanding zoning decisions by civil authorities should be restrained. "The court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked. ... [I]t is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties." White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 175 (Minn. 1982).

2. When reviewing a zoning matter, where the municipal body's proceeding was fair and the record clear and complete, review should be on the record. Where the body has proposed formal findings contemporaneously with its decision and there is an accurate verbatim transcript of the proceedings, the record is likely to be clear and complete. Swanson v. City of Bloomington, 421 N.W.2d 307, 313 (Minn. 1988). The parties are entitled to a trial where the body has failed to make a complete and adequate record of its proceedings in zoning matters. Id., at 312. *See* Honn v. City of Coon Rapids, 313 N.W.2d 409 (Minn. 1981).

3. An accurate, complete and clear record was made as part of the Benton County Board of Adjustment's meetings where the Defendant's variance request was denied and it is proper to decide the validity of that denial based upon a review of the record rather than by conducting a trial.

4. The test for determining whether the denial of a zoning variance request was proper is whether the zoning authority's action was reasonable or unreasonable, arbitrary or capricious. Swanson v. City of Bloomington, 421 N.W.2d at 311 (citing White Bear Docking and Storage, Inc., 324 N.W.2d at 176) (quoting Honn, 313 N.W.2d at 417). In determining whether the decision was reasonable, the Court must examine whether the reasons given by the body, in denying the variance application, were legally sufficient and had a factual basis. Id., at 313. *See* C.R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320, 325 (Minn. 1981).

5. The Minnesota legislature has delegated to municipalities the power to plan for the use of the land within their boundaries by establishing zoning and planning ordinances. VanLandschoot v. City of Mendota Heights, 336 N.W.2d 503, 507 (Minn. 1983). *See* Minn. Stat. §462.351 (1982). Counties in Minnesota have also been given the authority to establish zoning and planning ordinances. *See* Minn. Stat. 394.21 (1998).

6. A municipal decision-making body, has broad discretionary power to deny an application for a variance. Hedlund v. City of Maplewood, 366 N.W.2d 624, 626 (Minn. Ct. App. 1985) (citing VanLandschoot, 336 N.W.2d at 508-9.) "The fact that a court reviewing the action of a municipal body may have arrived at a different conclusion, had it been a member of the body, does not invalidate the judgment of the city officials if they acted in good faith and within the broad discretion accorded them by statutes and the relevant ordinances." VanLandschoot, 336 N.W.2d at 509. (citing White Bear Docking, 324 N.W.2d at 176). "The setting aside of routine municipal decisions should be reserved for those rare instances in which the [county's] decision has no rational basis." White Bear Docking, 324 N.W.2d at 176.

7. The Benton County Development Code states that the Board, "shall have the exclusive power to order the

issuance of variances from the terms of any official control..." Benton County Development Code, 11.4.8. The Code sets forth the standards for granting or denying variance requests in Benton County Development Code 11.5.1. These standards are:

(1) The proposed use is not prohibited in the zoning district in which the subject property is located.
(2) The variance must be in harmony with the general purposes and intent of the ordinance.
(3) The terms of the variance must be consistent with the comprehensive plan.
(4) The landowner must show that the variance is necessary to alleviate practical difficulties or particular hardship in the way of carrying out the strict letter of the ordinance.

"Hardship" as used in connection with the granting of a variance means:

a. The property in question cannot be put to a reasonable use if used under the conditions allowed by the ordinance;
b. The plight of the landowner is due to circumstances unique to the property, not created by the landowner;
c. The variance, if granted, will not alter the essential character of the locality.

Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance.

8. The Benton County Ordinance closely follows Minn. Stat. §394.27, Subd. 7 which states:

Creation and duties of a board of adjustment.

Subd. 7. Variances; hardship. The board of adjustment shall have the exclusive power to order the issuance of variances from the terms of any official control including restrictions placed on nonconformities. Variances shall only be permitted when they are in *harmony with the general purposes and intent* of the official control in cases when there are *practical difficulties or particular hardship in the way of carrying out the strict letter of any official control,* and when the terms of the variance are *consistent with the comprehensive plan.* "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance. Variances shall be granted for earth sheltered construction as defined in section 216C.06, subdivision 2, when in harmony with the official controls. *No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located.* The board of adjustment may impose conditions in the granting of variances to insure compliance and to protect adjacent properties and the public interest. The board of adjustment may consider the inability to use solar energy systems a "hardship" in the granting of variances. (emphasis added.)

9. The proposed use of the Plaintiff's business, known as "The King's Inn" is not prohibited in the zoning district in which the subject property is located.

10. The Defendant had a rational basis for deciding the variance was not in harmony with the general purposes and intent of the setback ordinance.

Setback requirements are a reasonable way of implementing the general purposes and intent of municipal ordinances. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986). The general purpose and intent of Benton County's setback requirement is to protect residential neighborhoods from the negative secondary effects associated with adult businesses. This protection is a valid, indeed, substantial government interest. *See* Id. at 50-51. The Minnesota Court of Appeals has also approved of the use of setback ordinances to protect residential neighborhoods from negative secondary effects of adult-oriented businesses. City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225 (Minn. Ct. App. 1997).

The Board had specific facts upon which it relied in making its determination that the variance was not in harmony with the general purposes of the setback ordinance. The Board examined and considered studies from the Plaintiff's consultant and numerous studies of negative secondary effects produced by adult-oriented businesses. This information was provided by the City of St. Paul; the Minnesota Attorney General's office; the City of Indianapolis, Indiana; Rochester, Minnesota; Los Angeles, California; Phoenix, Arizona; Adams County, Colorado; Amarillo, Texas; and Austin, Texas. The studies found, among other things that adult-oriented businesses increase crime in the areas, increase noise, traffic and glare, and have negative impacts on property values. A zoning authority may properly rely upon studies from other cities when making determinations regarding variances and whether they are harmonious with the general purposes of setback ordinances.

Id. The authority need not conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the authority relies on is reasonably believed to be relevant to the problem that the authority addresses. Id., at 229 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S.Ct. at 931 (1986).

The Board also heard from numerous members of the community who presented reasonable concerns and facts associated with the Plaintiff's business. Testimony was given regarding low property values, unsafe conditions near the business and criminal activity in the area of the business. These were consistent with the conclusions of various negative secondary effects produced by adult businesses and specifically associated with "The King's Inn."

In this matter, Benton County reasonably relied upon information and studies which examined a number of adult-oriented businesses and the negative secondary effects produced by them. Therefore, the Board's determination that the requested variance was not in harmony with the general purpose and intent of the ordinance to protect residential neighborhoods from harmful negative secondary effects of adult businesses and the conclusion that the variance, if granted, would alter the family neighborhood character of the locality were based upon facts and legally sufficient reasons.

11. The comprehensive plan of the Benton County Development Code is to eliminate nonconforming uses of zoned property. *See* Benton County Development Code, 7. 10. 3. The facts show that the proposed adult use which would be permitted by the granting of a variance would be inconsistent with the comprehensive plan. Therefore, the determination of the Board to not grant the variance was based upon legally sufficient and rational reasons.

12. The Plaintiff has not shown that a variance is necessary to alleviate practical difficulties or particular hardship in order to carry out the ordinance. By the terms of

the Benton County Development Code, 11. 5. 1, economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance.

The Plaintiff presented evidence to the Board of the changes and modifications made to the structure of "The King's Inn" to better facilitate its 'adult use' and the costs of such improvements. These modifications included a runway for dancers, a modified ceiling and roof, specialized lighting and sound equipment and security equipment. The Plaintiff claimed that the facility could not be put to any other reasonable use if used in conformity with the ordinance.

Formally the property involved in this case was a restaurant. The facts and review of the video tape of the property do not exclude this as a reasonable use for the property again. It may also be reasonably used for office space or other commercial ventures. The improvements to the property in the way of the runway, lighting, sound and security equipment could be easily removed without incurring unreasonable costs. The roof modifications could remain for alternate uses for the building and the air conditioning and heating systems and the interior ramps would be required for any occupancy. Since a reasonable use for the property does exist under the terms of the Benton County Ordinance, these considerations by the Plaintiff are economic and therefore do not constitute a hardship.

The Plaintiff has also failed to show that its plight is due to circumstances unique to the property which were not created by the landowner. The Plaintiff purchased the business of "King's on the Lake" in January of 1997 for approximately $250,000. The then owner of the property made modifications to the building to better facilitate its adult-use and then sold the real property to the Plaintiff in January of 1998. Though it cannot be said that the Plaintiff in this case created the plight which now exists, it knew of the plight at the time it purchased the property.

Therefore, the Plaintiff has not shown that the hardship is unique to the real property involved because the real property can reasonably be used for other purposes exclusive of its adult-use.

The Plaintiff claims the variance, if granted, will alter "nothing" of the essential family character of the locality. The burden is on the Plaintiff claiming hardship to show that the character of the locality will not be altered. The record does not reflect any substantive evidence of this nature, but does include credible and reasonable testimony regarding the adverse effects of granting the variance and how the essential character of the residentially-zoned area has been and will be altered.

Based upon the history of the property, the on-site visits made to the property by the Benton County Board of Adjustment, the video tape of the premises and the testimony of residents from the area, a factual and legally sufficient basis exists for the Board's determination that the Plaintiff has not shown hardship to exist within the meaning of Benton County Development Code, 11. 5. 1 and has a rational basis for denying the variance as related to the 'hardship' factor.

13. In light of the foregoing, the Benton County Board of Adjustment's decision to deny the variance application of the Plaintiff was rationally based. It was not arbitrary or capricious and the reasons given by the Board were legally sufficient and had their basis in fact.

Issuance of a temporary injunction

14. A temporary injunction is an extraordinary equitable remedy that preserves the status quo before a trial on the merits. Krueger v. Wash. Fed. Sav. Bank of Montevideo, 406 N.W.2d 543, 545-46 (Minn. Ct. App. 1987) (citing Miller v. Foley, 317 N.W.2d 710, 712 (Minn. 1982)). The Minnesota Supreme Court in Dahlberg Brothers, Inc. v. Ford Motor Company set out the factors to be considered by the Court in

considering whether a temporary injunction of the zoning restrictions when it purchased the business and when it purchased the real estate. The Plaintiff made its application for a variance from Benton County approximately nine (9) days before the four-year period was to end. The Plaintiff's business has continued to operate since that time in violation the Defendant's ordinance in effect extending the amortization period by waiting until the 'last minute' to process its claim for a variance and its constitutional attack on the ordinance. The Defendant has an important and substantial government interest in protecting residential neighborhoods in the area from negative secondary effects of adult-use businesses.

16. "A temporary injunction should be granted only where it is clear the rights of a party will be "irreparably injured" before a trial on the merits is held." Krueger, 406 N.W.2d at 546. (quoting Miller v. Foley, 317 N.W.2d 710, 712 (Minn. 1982)). A party requesting an injunction must show irreparable harm if the injunction is not issued, while the party opposing the injunction need only show substantial harm if it is issued. Shakopee Mdewakanton Sioux (Dakota) Community, 586 N.W.2d at 410. *See* Pacific Equip. & Irrigation v. Toro Co., 519 N.W.2d 911, 915 (Minn. Ct. App. 1994).

The Plaintiff claims that enforcing Ordinance 242 and the setback requirement is unconstitutional as a violation of its First Amendment right to free speech and that having to choose between exercising its constitutional right and facing the possible misdemeanor penalty of 90 days in jail, a fine of $700 or both or foregoing the exercise of that right creates irreparable harm as a matter of law and justifies the preliminary injunction.

The argument that the ordinance is facially unconstitutional has been determined to be without merit. "Zoning ordinances which are designed to combat undesirable secondary effects of businesses dealing in

sexually explicit materials are reviewed under standards applicable to "content neutral" time, place, and manner regulations." City of St. Paul v. Carlone, 419 N.W.2d 129, 132 (Minn. Ct. App. 1988) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 929-30, 89 L.Ed. 29 (1986)). The Plaintiff's First Amendments rights have not been improperly infringed since reasonable alternative avenues of communication are open to it. Indeed, the business, if located approximately 400 feet further away from a residentially-zoned area, would be free to engage in exactly the same business activity it now practices. Since Benton County's Ordinance 242 is not facially unconstitutional and the Plaintiff is not restricted from exercising its First Amendment rights, except as to its current location, it has not demonstrated as a matter of law that it faces irreparable harm if the temporary injunction is not granted. The Plaintiff faces no more harm than that faced by all real estate purchasers in dealing with local zoning ordinances.

Combating negative secondary effects of adult-oriented businesses has been determined to be a substantial government interest unrelated to the suppression of free expression. City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225, 229 (Minn. Ct. App. 1997). *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-51, 106 S.Ct. 925, 930-31, 89 L.Ed. 29 (1986); and ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994). The Defendant desires to protect the residential neighborhood character of its inhabitants and, more broadly, the general welfare, safety and health of its residents.

In light of the foregoing, the Defendant is substantially harmed by the granting of the temporary injunction and preventing it from the lawful enforcement of zoning codes. This outweighs the harm to be incurred by the Plaintiff in proceeding to trial and denying the temporary restraining order and injunction. The Plaintiff has failed to meet its

burden of showing irreparable harm if the injunction is not issued.

17. A Plaintiff must make a reasonably sufficient showing on the merits of its underlying claim, that it is likely to succeed on those merits and is entitled to the relief demanded. Miller v. City of Saint Paul, 363 N.W.2d at 811; Dahlberg, 137 N.W.2d at 323.

In order for the Plaintiff to succeed on the merits, it must show either that the Board's decision was arbitrary and not rationally-based or that the Ordinance violates the constitutional rights of the Plaintiff in its regulation of adult-use business establishments.

Since this Court has concluded that the denial of the variance was rationally-based, the Plaintiff has failed to succeed on this front.

In order for the Ordinance to be determined unconstitutional, the Plaintiff must prove it to be an invalid content-neutral, time, place and manner regulation. An analysis of this requirement involves two parts; considering whether the Ordinance is narrowly-tailored to serve a substantial government interest and whether it unreasonably limits alternative avenues of communication. City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225, 229 (Minn. Ct. App. 1997).

As discussed, courts have consistently held that preventing the negative secondary effects associated with adult-use businesses is a substantial government interest unrelated to the suppression of free expression. Id. at 229. *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-51, 106 S.Ct. 925, 930-31, 89 L.Ed. 29 (1986). The Plaintiff claims the Defendant has not met the burden of showing that the Ordinance is narrowly-tailored to a government interest because it erroneously relied upon facts and studies which were pretextual and inaccurate.

The Supreme Court has determined that "[t]he First Amendment does not require a city ... to conduct new studies

or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51, 106 S.Ct. 925, 931, 89 L.Ed. 29 (1986). In this case, the Benton County Board of Adjustment relied upon studies and evidence of negative secondary effects of adult-use businesses from the City of St. Paul; the Minnesota Attorney General's office; the City of Indianapolis, Indiana; Rochester, Minnesota; Los Angeles, California; Phoenix, Arizona; Adams County, Colorado; Amarillo, Texas; and Austin, Texas. The studies found, among other things that adult-oriented businesses increase crime in the areas, increase noise, traffic and glare, and have negative impacts on property values. The Minnesota Courts have held that a city need only prove that the ordinance targets businesses "reasonably believed to produce at least some of the unwanted secondary effects..." City of Crystal v. Fantasy House, Inc., 569 N.W.2d at 230 (citing ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994)). Although the Plaintiff contends that being located in a rural setting along Highway 10 eliminates the application of studies demonstrating negative secondary effects found in urban areas, the Eighth Circuit Court of Appeals has found that negative secondary effects can result from adult-use businesses located in similar rural surroundings as the Plaintiff's business. *See* Holmberg v. City of Ramsey, 12 F.3d 140, 143 (8th Cir. 1993).

The Board also relied upon testimony from members of the public in making its determination that negative secondary effects exist from the operation of the Plaintiff's business. A municipal board may rely on nonexpert testimony to rebut expert testimony if such evidence is competent and not based upon 'non-specific' neighborhood opposition. BBY Investors v. City of Maplewood, 467 N.W.2d 631, 635 (Minn. Ct. App. 1991). *See also* SuperAmerica Group, Inc. v. City of Little

Canada, 539 N.W.2d 264, 267 (Minn. Ct. App. 1995). The public testimony gave specific examples of low property values in the area, unsafe conditions near the business, criminal behavior in and around the area of the real property and was based upon personal knowledge.

The Board considered the information given by the Plaintiff's expert, the numerous impact studies from other cities, the competent public witnesses, the bias of the party's witnesses and their credibility. It reasonably believed that the evidence it relied upon was relevant to the problems concerning it and therefore, the denial of the variance and the ordinance is narrowly-tailored to meet a substantial government interest.

The second prong of the constitutional analysis is whether there exists reasonable alternative avenues of communication of the sort employed by the Plaintiff.

The First Amendment requires only that the County not deny adult-use businesses a reasonable opportunity to locate a business within the county." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54, 106 S.Ct. 925, 932, 89 L.Ed. 29 (1986). "Each business must fend for itself in the real estate market and cope with the same problems that all prospective purchasers face." City of Crystal, 569 N.W.2d at 230 (citing City of Renton, at 54, 106 U.S. at 932).

There exist other lawful locations for the Plaintiff's business which would not violate the setback requirements of the Benton County ordinance. Therefore, reasonable alternative avenues exist within Benton County for the Plaintiff to exercise their First Amendment rights. This along with the reasonable reliance of the Board on studies and testimony that analyzed the negative secondary effects of the Plaintiff's adult-use business showing the Ordinance to be narrowly-tailored to serve a substantial government interest support the conclusion that the Ordinance is likely to be found constitutional.

In light of the foregoing, the Plaintiff is unlikely to prevail on the merits of its action and is not entitled to the temporary injunction or temporary restraining order which it seeks from the Court.

18. The public policy expressed in the statutes is to allow for local government boards to institute and enforce land use and planning regulations. Minn. Stat. 394.232 states: "Each county is encouraged to prepare and implement a community-based comprehensive plan. A community-based comprehensive plan is a comprehensive plan that is consistent with the goals of community-based planning in section 4A.08." Minn. Stat. 394.21 further grants the authority for counties to carry on county planning and zoning activities. "Subdivision 1 Except most populous counties. For the purpose of promoting the health, safety, morals, and general welfare of the community any county in the state having less than 300,000 population according to the 1950 federal census is authorized to carry on county planning and zoning activities." Minn. Stat. 394.21(1998). The ability to enforce zoning regulations is a compelling public concern, without which local governments could not control land use within its boundaries. Public policy also overwhelmingly endorses freedom of expression and rights under the First Amendment of the Constitution.

In this case, since the Plaintiff's First Amendments rights are limited by a constitutional content-neutral, time, place and manner regulation and where the State of Minnesota allows and encourages counties to institute zoning and planning activities, public policy favors the denial of a temporary restraining order or temporary injunction which would disallow the county to enforce its zoning ordinance.

19. If the temporary injunction or temporary restraining order were granted, ongoing judicial supervision of the Defendant's actions toward the Plaintiff's business would be minimal. Therefore, the administrative burden of enforcing an injunction is not a major factor.

20. When the five Dahlberg factors are weighed and considered, this Court denies the request of the Plaintiff for a temporary injunction and a temporary restraining order. The Plaintiff who seeks the injunction has not established that the legal remedy is inadequate and the injunction is necessary to prevent great and irreparable harm.

ORDER

1. The denial by the Benton County Board of Adjustment of the Plaintiff's application for a zoning variance is **AFFIRMED.**

2. The Plaintiff's requested relief in Count I of the Complaint is **DENIED.**

3. The Plaintiff's motion for a temporary restraining order and temporary injunction against the enforcement of Benton County Development Code, Ordinance 242 is **DENIED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 2 day of April, 1999. s/
James W. Hoolihan
Judge of District Court

JUDGMENT

I hereby certify that the foregoing constitutes the Judgment of this Court.

Dated: 4-5-99

TIMOTHY R. ROBERTS
Court Administrator

By: s/Monica Tschumper
Deputy Court Administrator

PUBLIC HEARING

BENTON COUNTY BOARD OF ADJUSTMENT

RE: FILE NO. 403, KISMET INVESTMENT, INC., DBA KING'S INN

taken at

Henry's Banquet Center, 6774 Highway 25 Northeast

Foley, Minnesota

taken on

September 17, 1998

commencing at

approximately 7:00 p.m.

HUBER COURT REPORTING
NORWEST CENTER, SUITE 680
ST. CLOUD, MINNESOTA 56301
(320) 259-0824

* * * * *

I'm also alumni association, part of St. Cloud State. It alone provides scholarship funds for students, which itself -- Well, excuse me.

MR. BINNIE: We would like to go on to the township and state input.

CHAUNCEY: I have no comment from the town board.

MR. BINNIE: All right. How about the DNR input?

(No audible response.)

MR. BINNIE: All right. Now we would like to ask for people that are to speak against this variance. And I would like to hear from as many people as possible. But we have to keep this short. And we have to allow time for everyone.

MR. HANSON: My name is Lee Hanson. My address: 548 115th Street Northeast in Rice, Minnesota. I live almost immediately across the lake from the King's Inn location. I've lived there with my family for 27 years. We used to eat at the King's Inn until it closed as a restaurant and became an adult entertainment center. I really want to make three quick points here.

I'm adamantly opposed to your granting the variance for the King's Inn to continue as an adult entertainment center. Number one, I think the very bulky presentation, which I agree was very well made, tonight does not make the point that all of the requirements for the variance are satisfied.

Number one, I would submit that you don't even have the authority to grant a variance in a case where the use is a prohibited use for the land on the other side of the boundary within 500 feet, which in this case is a residential use. You don't have the authority to grant a use or -- a use within that 500-foot setback.

But even in the alternative, I would submit to you that the extensive testimony that was provided to you tonight by the people in favor of this variance showing that there would be a financial hardship is all unique to the owner of this property,

not to the character of the property. It's the character of the property now. But I would point out to you that the Rumors Restaurant and Bar, which I've frequented many, many times, also has had many new owners over the past, I think, than King's Inn has. And that's going very successfully today.

And I would submit that a restaurant and bar in the King's Inn location would work as well as a number of other things that would work. And much of the expense that was put into the King's Inn was put in after this business was purchased by this owner, and is a hardship which the statute specifically says cannot be considered by this board when being asked to grant a variance.

And I would submit a matter of opinion, and I know it's going to be opposed by people that are attempting to propose the variance that this does not change the character of the neighborhood, but I think it does. I think all the people here tonight are here to tell you that it does and that they don't want it within 150 feet of a residential neighborhood.

With respect to the employment, I think all of us in St. Cloud know that the employment -- unemployment levels in St. Cloud are at record-low levels. I understand the wish of these people to make $40 an hour. All of us would like to make $40 an hour. There are many people that are supporting families that don't make one-fourth of $40 an hour. And I would submit that all of these people can find gainful employment in St. Cloud to go to school or to support their children if this place is closed. Thank you.

MR. BINNIE: Thank you. We want to keep -- From the crowd's reaction, it sounds like we were all in -- You were in agreement with this. If you come up here, state your name, and if you kind of agree to what Mr. Hanson has said, let's go through that way, please. We want to do this as quickly as possible, so we can hear as many people as we can.

Please come up and state your name.

MR. BENIEK: My name is Gene Beniek. I'm a tax payer in Watab Township. I've lived here for 22 years. I'm

also a marriage and family therapist. And confidentiality prohibits me from giving you experiential and validated data, but it is not anecdoted.

I have clinically seen the employee -- employees, some dancers, clients, spouses, patrons of King's Inn, and I see lots of people. But I see -- I have experienced no socially redeemable value from the King's Inn's presence in business.

Secondly, I'd like to recount a phone conversation I had with the owner -- or at least supposedly -- He said he was the owner of the King's Inn, whether it was under the current ownership or an alias or some form of the ownership -- I challenged the owner the fact that I felt that he was providing an opportunity and abusing -- and providing an opportunity for people to abuse women.

Having three daughters of my own, I challenged him if he would have his own daughters dance. And he said "Absolutely not." And I said "Well, you're abusing women." And he said -- "It's a known fact," he said, "that 80 percent of the dancers have been sexually abused. That's not my fault." And I said "Well, you're just one more in a line of abusers." And he said "I have a right to make a living."

So my suggestion is that when it comes to your decision that there are some things that are greater than rights to make a living.

Lastly, I would like to just comment that, if the community does not stand up to something, then we all become part of what often happens in history that all that needs to prevail or able to prevail is for a few good people to say nothing. I think it behooves the Board to challenge the bully that rules the world.

And lastly, I would just like to comment that, in my perception, the people who are proposing this and defending it and arguing very legalistically for it are in some way advocating their own ethical rights and responsibilities for standing up for justice. Thank you.

MR. BINNIE: Thank you. Do we have any other home owners near Little Rock Lake?

MR. BRADLEY: Ron Bradley is my name, and I currently live the closest to the King's. I'm deeply opposed of granting them their wishes. I for one have to get up at 5:30 every morning and go to work. They are open until 4 o'clock in the morning. What kind of clientele do you suppose comes there at 4 o'clock in the morning? That's all I have to say.

MR. BINNIE: Anyone else?

MR. KAINZ: My name is Don Kainz. My wife and I have lived on Little Rock Lake for the last 31 years. And as we had mentioned, we also enjoyed going to the King's Supper Club when that was part of it. But since then, that whole scene has changed.

And I think one of the things that has become a very disgusting thing for me and almost feel embarrassed and ashamed is when we have friends of ours who call to get directions to come to our house, and we tell them to take such and such road. They'll say "Oh, that's by the King's." And then there's a momentary disgusted laughter and continue to go on with the discussion.

We really feel that it has blighted the area. We're concerned about property values, even though discussion has been otherwise. Yes, values may have gone up, but so have values all over the place.

We're in the construction business. And when I heard approximate values tonight spoken, that might be true, but that hasn't been substantiated either. So we ask the Board to seriously consider denying this request for variance. Thank you.

MR. BINNIE: Thank you.

MR. ROLLINGS: My name is Dave Rollings (phonetic). I live right adjacent to the King's Inn also. Now, there's been people up here talking about how safe the place is inside and about what their hardships would be if they were to close. Well, I have a lot of hardships with the place also. Their

patrons cause a lot of damage, a lot of verbal abuse, a lot of trespassing, a lot of yelling and screaming in the parking lot. So I'm definitely very against this. I've got more items, but I just want to make it short so everyone else can get a chance to speak up here. So I'm very much opposed to this. Thank you.

MR. BUKOWSKI: Do you live at the first place to the north in that trailer?

MR. ROLLINGS: That's correct.

MS. THIELEN: Hi, my name is June Thielen, and I also live by Little Rock Lake. And I've come forward to ask the Board to simply uphold the ordinance as it stands. The King's Inn does not meet the criteria for granting a variance.

Number one, the use is prohibited if it's within 500 feet of a residential neighborhood. They are requesting a change of use.

Number two, the variance is not at all in harmony with the intent of this ordinance. The ordinance was written to protect our community from the crime and blight of sexually-orientated businesses dragging with them. They are asking to be and remain in people's back yards.

Number three, the King's has no hardship of any kind. There are many other uses for this land. The plight of this landowner is self-inflected having nothing to do with the property itself. And most of all, the enormous effect of the character of this location.

The supreme court has stated in Renton versus Play Time Theaters that a community does not have to have specific evidence of negative secondary effects of a sexually-orientated business, but can rely on relative experiences of other communities of that the proof is endless. Increased crime, association with organized crime, decreased property values, these will affect our community.

And number four, from the standpoint of a wife, a mother of four, and being a woman who continually must travel

down Highway 10 and again and again and again read "Totally nude 40-girl review. VIP room. Best food in town."

Up until four years ago, this community was a strictly family-orientated community. All evidence shows no more King's. All hearts here say enough. We are reclaiming the decency in our community. We are asking you, the Board, to do what is right, what is legal, and what is fair. Strip joints do not belong in neighborhoods. And again, I request that the Board deny the variance, and I have signatures also requesting the same. Thank you.

MS. EDER: Hi, my name is Kelly Eder. I don't live by King's, but it's still a part of my life every day. My ex-boyfriend cheated on me with a stripper, or whatever you want to call her, prostitute from King's. And I hold in my hand HIV testing that I've had to take because of her and her sleeping around with her clients and other people. I know of drugs that have went on there. I know my ex-boyfriend and some of the people there that have done drugs there.

And if you talk about the alcohol, Rumors, why they have more calls there than King's does, well, when they go to Rumors, they drink there and they go to King's, go back to Rumors. So that is why there is more calls at Rumors. Alcohol being a problem there, I've seen people that are totally intoxicated there. I've even went there with my boyfriend, and we were probably way past the alcohol limit there. And it seems like there are fights there inside and out.

There is -- I don't understand how they can't go to school without working at King's. I'm 22. I graduated with some other girls from high school. I paid my own college. I got loans. I got financial aid. One girl said how she couldn't get loans. Yeah, you can. It doesn't matter what your parents make. You can get a loan no matter how much your parents make. Maybe you can't get financial aid, but you can get a loan.

I don't have a kid. That was my choice not to have a kid. But I pay my rent. I pay my car. I pay my insurance. I pay

my food. I pay everything on my own. Maybe I don't have one job making $40 an hour. But, yes, I have three jobs to pay what I want -- for what I want to get what I need.

And just I know -- I've met Keith, and he's really nice in person. But I've also heard where he has hurting girls. I can't prove any of that. But I've known -- I've heard stuff about that.

And also with having a degree in advertising, I've -- When I went there, I asked if they had food because I was hungry. And they said, no, they don't have food, but they do in back. You have to make it yourself, and usually it's for the dancers or whoever works there. That's false advertising. You can't have that in a building without having food there consecutively.

That's all I really have to say. I don't think it's a good place. And St. Cloud is a family place. It's just bringing wrong crowds there.

MR. BINNIE: Okay. Thank you.

MR. OSSMAS: My name is Aaron Ossmas (phonetic). I live in Rice. I'm concerned about King's being granted a variance to continue operation in our community. Apparently they've been existing there because of the constitutional right of expression. But also give our people -- our government the right to regulate businesses for the overall welfare of the whole community. So our county has an ordinance which does not permit an adult-use business, as you find in the ordinance, to exist within 500 feet of the residentially-zoned area. That's the ordinance. It's pretty straight. It could be a restaurant or a craft store, any number of businesses. But King's has chosen to be a business which does not fit the zoning standards, which include that 500-foot setback.

It asked for a variance, not for extra parking spaces or change in the slope of their land or the building of a garage in a slightly different location, but an allowance which would effectively change the integrity of the ordinance as it's been established regardless of use of the land. People from the

neighborhood are concerned. We've been hearing that. Concerned about the negative impact that we believe is already taking a place in the immediate area.

Studies show that adult use of -- the adult-use business or sexually-oriented business carries negative impacts in the surrounding area. I believe it goes farther than just looking at land value. I think the girl who just spoke helps out some of the relationship things that cause these outside any other family.

I'm a pastor of Shepherd of the Pines Lutheran Church. And I work with families, and I visit with families. In my past experience as pastor of Shepherd of the Pines, it's my opinion that families hurt when God's gift of sexuality is used to arouse an empty fantasy and how it hurts families when love is not the center or when love is taken away from one of the partners in that kind of a way.

Where citizens are concerned, even thinking of using a barrier for a residential area seems absurd where we have an adult business within 150 feet of a school, within 150 feet of a church, within 150 feet of a day-care. We don't want this precedent set. We'd like to see our ordinances upheld.

MR. BINNIE: Thank you. We'd like to keep these short.

MS. HOIHJELLE: I can do that.

MR. BINNIE: Your name, please.

MS. HOIHJELLE: My name is Carol Hoihjelle. My husband owns Rumors Bar and Grill. And my husband and I along with my three teenage boys live in the house that is immediately behind the bar.

I can tell you about a personal experience that took place back last August where I had never met Keith Keller before. And apparently he thought I was behind one of the protests that had taken place at his establishment. He was in Rumors Bar after hours. I could overhear him from my house in the middle of the night threatening my husband with his safety, threatening my husband with the welfare of his business,

threatening to bring in gangs. And I didn't know who this person was.

And Keith would probably be really happy right now to know that my husband doesn't know I'm here and to know that I'm terrified to be here, because I approached Keith at night in my pajamas, not knowing who he was, asking him who he was. And he proceeded to tell me that he owns any property there. He owns the people. He can control the people. He can muscle the people. And if I were to say anything about this establishment ever again, he'll put gangs into my husband's place of business, run us out of business, drive us out of house and home, hurt my children, and rape me. The word was "bang," Keith, if you remember correctly. I do.

MR. BINNIE: Direct your response to us, please.

MS. HOIHJELLE: I apologize. I apologize. But if you want to talk about safety and well-being, I'd like to submit this: When I first graduated from high school and I needed a job, I got an apartment that I shared with some girls. And I lived in South Minneapolis and walked to and from work, and I worried less for my safety as a teenager in South Minneapolis than I do as an adult today. That from a small community. And if Rice loves its kids, let's take care of the community then when we have a choice and a chance. Thank you.

MS. THIELEN: Hello, my name is Chelsea Thielen. And I also live by Little Rock Lake. And I can remember I used -- We went there a couple times when I was younger when it used to be a family restaurant. And I can remember having a really good time and remember it being a pleasant place.

And I'll never forget the day when we were driving by there with my mom. She said "Oh, my gosh." And I looked over and I saw the look on her face, and then I looked over at the King's Inn. And I saw the big sign that read "exotic dancing." And, at that age, I didn't quite understand what

exotic dancing meant, and my mom explained to me that it meant nude dancing.

And I -- Nights after that, I can honestly say that I had nightmares. And I never had any good thoughts about that place. I would never think about going near there. I am still uncomfortable about having that there, being a teenager. And I would request that, you know, they cannot be there. Hopefully, there's a place where me and my friends can go hangout like at parks or something that would be there instead.

MS. BENIEK: My name is Barb Beniek. I'm a resident of Watab Township, 8905 Sanbur Trail. I'm a parent and taxpayer and I'm also an educator and I've worked for the welfare of the children of this community for the past 13 years as a member of the school board in Sauk Rapids-Rice.

And I think it's a tragedy that we have this kind of opportunity for employment and for entertainment for the young adults in our community. I think it's contrary to the values of our community. And as a taxpayer, I would highly support using the money of our county to fight whatever legal battles that we have to fight.

MR. BINNIE: Thank you. Any other landowners here? Short, sweet, easy.

MR. BARTHELEMY: Make it brief. My name is Al Barthelemy. The statutes and the zoning ordinance spells out the criteria for getting variances after getting a hardship. However, it also states that economic considerations alone shall not constitute a hardship if a reasonable use of the property exists under the terms of the ordinance.

There are many uses of this business district that would be a reasonable use for this property and has been a reasonable use in the past. I think it does not comply with the criteria spelled out for granting a variance, and I strongly suggest that you deny the variance. Thank you.

MR. BINNIE: Anyone else like to speak?

MR. MAJESKI: Hello, my name is Francis Majeski. I live in Royalton. I drive by the King's to and from work. And I'd just like to counter some of the points that were made by the lawyer and also by comments of the employees.

They speak about how safe they feel when they're there. If it is so safe, why is it that they need to be escorted to and from their car?

As for hardship with employment, the other gentleman a while back mentioned that there are a lot of jobs already in St. Cloud.

And no other use? It used to be a restaurant. It cost a lot of money to convert it to its present use. It can still be a restaurant. It may cost more to convert it back.

They speak up about how many police calls have been made there versus Rumors. They have bouncers. They are meant to keep order. How many fights have been broken up without the need of calling police? But from what I understand, there have been many calls to Rumors for fights involving employees of the King's.

Also the lawyer mentioned about the definition of change of character, I'm not familiar totally with that. I was trying to listen. But he said that it does not change the character of the surrounding area because eventually that area will be used for businesses in the future. That's in the future, sir. Right now there are homes there with families. In order to fit the lawyer's definition of character of the area, those families would have to move. That's all I have to say. Thank you.

MR. SEPPELT: My name is Al Seppelt. I am here this evening not only as a Benton County Commissioner, District 2 -- By the way, that's only going to be commissioner for another three months. But I'm a concerned neighbor, husband, father, and grandfather.

The King's Inn is located in my district and community. It's not a good thing for our community. It does not represent the value of our community. I urge you to vote against this variance. I pledge the time I have left on the Board to support

you with your county resources in this decision. As you know, however, this is my community and my neighborhood and I will do what I can with what is available for the support. Thank you.

MR. BINNIE: Okay. Thank you.

MR. TIGUE: Mr. Chairman, I'd just like an opportunity to present some brief rebuttal to some of the testimony presented.

MR. BINNIE: Yes, sir. Yes.

MR. TIGUE: I'd like to call Mr. McLaughlin back, briefly.

MR. MCLAUGHLIN: Mr. Chairman, very, very briefly, one gentleman stated that the issue of property values was not proven. I direct you to Page 87 of Volume 1 of the report. You have address by address, property by property the values and the comparison which is the flaw of most of the quote "studies" close quote. There is no comparison. Empirical data clearly shows the property values are

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9.1.7 Sign Removal

(a) The applicant for a sign permit shall be deemed the owner and thus responsible for the removal of the sign within six (6) months of its discontinued use as determined by the County Assessor, or for the removal of a sign which is structurally unsafe or in disrepair as determined by the County Zoning Administrator.
(b) Signs not so removed by the owner will be removed by the County at the owner's expense.

9.2 Off-Street Parking

9.2.1 General Provisions

(a) Under no circumstances shall required parking facilities accessory to residential structures be used for the parking of automobiles belonging to the employees, owners, tenants, or customers of nearby business or manufacturing establishments.
(b) Required off-street parking space shall not be utilized for open storage of goods or for the storage of vehicles which are inoperable or for sale or for rent.
(c) Required off-street parking spaces shall be provided as determined by the County Planning Commission.

9.2.2 Location Requirements

All off-street parking facilities required herein shall be located in respect to the following:

(a) Spaces accessory to one family, two family and multiple dwellings on the same lot as the principal use served.
(b) There shall be no off-street parking space within 5 feet of any road right-of-way.
(c) No off-street open parking area containing more than 4 parking spaces shall be located closer than 15 feet from an adjacent lot zoned or used for residential purposes.
(d) Business and Industrial off-street parking spaces shall not be less than 10 feet from a property line.

9.2.3 Design Requirements

(a) Each parking stall shall be not less than 10 feet wide and 20 feet in length, exclusive of access drives. All outside parking spaces shall be clearly marked.
(b) Parking areas shall be designed so as to provide adequate means of access to public streets. Such driveway access shall not exceed 30 feet in width.
(c) All of the area intended to be utilized for parking space and driveways shall be surfaced with a material which controls dust and drainage. Parking areas for less than three vehicles shall be exempt. Plans for surfacing and drainage shall be subject to approval of the Engineer.
(d) All lighting used to illuminate an off-street parking area shall be so arranged as to reflect

the light away from adjoining property and right-of-way.

(e) All open off-street parking areas shall provide a curb or a guard of normal bumper height to ensure that no portion of a vehicle encroaches into the required setback.

(f) All off-street parking spaces shall have access off driveways and not directly off the public street.

9.3 Loading Spaces

Loading spaces shall be provided as determined by the County Planning Commission.

9.4 Drive-In Businesses

9.4.1 Location Requirements

(a) No drive-in business shall be located within 500 feet of a school or church.

(b) No drive-in shall be located within 300 feet of any residentially zoned property.

(c) No access drive shall be within 50 feet of intersecting street right-of-way lines.

* * * * *

B.C. Dev. Code **Section 12**
Revised 11-16-94

12.0 Effectuation

12.1 Separability

12.1.1 It is hereby declared to be the intention that the several provisions of this Ordinance are separable in accordance with the following:

12.1.2 If any court of competent jurisdiction shall adjudge any provision of this Ordinance to be invalid, such judgment shall not affect any other provisions of this Ordinance not specifically included in said judgment.

12.1.3 If any court of competent jurisdiction shall adjudge invalid the application of any portion of this Ordinance to a particular property, building, or other structure, such judgment shall not affect the application of said provision to any other property, building or structure not specifically included in said judgment.

12.2 Appendices. The appendices to this Ordinance are intended to be a list of small tracts of land classified for land use by separate ordinances. Said tracts are too small to appear separately on the county land use map, but have been described by metes and bounds description. The following ordinances are hereby incorporated into and made a part of the designated appendices of this Ordinance.

MAR 26 2001
CLERK

No. 00-1305

IN THE
SUPREME COURT OF THE UNITED STATES

Kismet Investors, Inc., a
Minnesota corporation,

Petitioner,

vs.

County of Benton,

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This brief is submitted as a reply brief, pursuant to Supreme Court Rule 15.5. It is submitted for the purpose of replying to Respondent's brief in opposition to the petition for writ of certiorari, dated, March 15, 2001. To the extent that any arguments raised in Respondent's brief in opposition are not specifically addressed in this reply brief, such omission should not be considered in agreement with or concession of the validity of said argument, but rather as only reflecting Petitioner's position that the argument is dealt with adequately in the original petition.

Because the brief will also bring to this Court's attention supplemental authority arising since the submission of the original petition, the brief should also be considered a supplemental brief, submitted pursuant to Supreme Court Rule 15.8.

STATEMENT OF FACTS

In its statement of facts, Respondent gives a highly distorted view of Petitioner's establishment and the alleged secondary effects it caused. This is readily apparent from viewing the partial transcript set forth in Respondent's Appendix.

To begin with, it should be noted that absolutely nothing in that testimony contradicted the McLaughlin report indicating that in the years since its existence, property values in the area surrounding King's Inn have increased at double the rate of Benton County as a whole and at four times the rate of the property surrounding a

business at a comparable location, without adult entertainment. (Appendix A.232-A.242). Nor does any of that testimony contradict the McLaughlin report indicating that during its years of existence, Petitioner's establishment generated, on the basis of area and seating capacity, fewer police calls than Rumor's Bar, a nearby alcohol establishment; absolutely fewer police calls than a local gas station and convenience store; and absolutely no sex offenses or drug crimes (Petitioner's Appendix at A.225-A.231).

Rather, Respondent relies upon the testimony of a single neighbor who complains about noise and trespassing in the parking lot (Respondent's Appendix at 24a-25a), and a neighbor complaining of "shocking details of threats from the establishment's owner." Id. at 28a-29a.

Concerning the problems in the parking lot, it is significant that the ordinance at issue in the instant case, even if fully implemented, would do absolutely nothing to alleviate those problems. As noted by the District Court in its memorandum opinion, under the language of the ordinance, as construed by the District Court, the 500-foot setback requirement from residentially zoned property is to be measured "from the building providing adult use to the property line of the adjacent residence or residences." Petitioner's Appendix at A.44. What this means is that so long as the building housing the adult entertainment is 500 feet away from the property line, the parking lot can be immediately adjacent to residentially zoned property and the ordinance is not violated.

With respect to "shocking threats," Respondent's counsel conveniently omitted from the transcript presented to this Court the response of Petitioner's counsel to those remarks, set forth in the reply Appendix at R.A.1, in which the complainant was advised that the proprietor Petitioner's establishment "has no intention of raping you or bringing gangs. He does have an intention of suing you immediately for the lies he told this audience," a defamation lawsuit which was indeed subsequently brought.

Finally, it should be noted even though the Board of Adjustment which heard the above-described testimony denied Petitioner's request for a variance, it did not rely upon any of the foregoing testimony as a based for denial. See the Board of Adjustment's findings set forth in Petitioner's Appendix at A.84-A.86.

ARGUMENT

I. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER THE BENTON COUNTY ORDINANCE IS NARROWLY TAILORED TO THOSE USES FOUND TO CAUSE ADVERSE SECONDARY EFFECTS.

In its original petition, Petitioner argued that, on the basis the record presented to the court below, at minimum, a factual question existed as to whether the Benton County Adult Zoning ordinance was "narrowly tailored" to those uses found to cause adverse secondary effects, as required by this Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 52 (1986). None of the arguments advanced by Petitioner support rejection of that argument, and at least

two subsequent developments since the submission of the original petition support the argument.

Petitioner argues, without citation to authority, that so long as the ordinance was enacted "so as to address the adverse secondary effects attributable to a particular category of adult businesses," it meets the "narrow tailoring" requirement of *Renton*. The argument ignores the fact that the record in the court below plainly indicated that the modern "upscale adult cabaret" developed since most adult entertainment business studies were conducted, has no adverse secondary effects, a conclusion fully supported by the county's own data on property values in crime. See Petitioner's Appendix at A.120-A.127, A.225-A.242. This plainly places Petitioner's established outside the category of uses shown to cause adverse secondary effects, or at least creates a factual question as to whether it does.

Petitioner next argues that the record "included evidence that the presence of this particular business was causing harm and aggravation to neighboring residents." Respondent's brief p. 8.

As already noted, supra, much of that testimony was highly dubious and none refuted the county's own statistics on property value and crime. More significantly, at best, that testimony created a factual dispute requiring a trial, rather than a basis for summary judgment.[1]

---

[1]In this regard, it should be noted that the summary judgment standard under Rule 56 of the Minnesota Rules of Civil Procedure is identical to the standard adopted under Rule 56 of the Federal Rules of Civil Procedure, to-wit: that the

Even more significantly, two developments since the filing of the petition absolutely support Petitioner''s position.

To begin with, on March 5, 2001, this Court granted certiorari in the case of *Alameda Books, Inc. v. City of Los Angeles*, 222 F. 3d 719 (9th Cir. 2000). See ___U.S.___, 2001 W.L. 208720, 69 U.S.L. 3382 (March 5, 2001). Given the fact that the Minnesota Court of Appeals in the instant case at least implicitly found that the Benton County ordinance would not pass constitutional muster under the evidentiary standard adopted in *Alameda Books*, and upheld the ordinance only by rejecting such a standard,[2] at minimum, a decision on a writ of certiorari in the instant case should be withheld until *Alameda Books* is decided on its merits.

Secondly, since the time the original petition for writ of certiorari was filed, the United States Court of Appeals for the Eleventh Circuit decided *Flanigan's Enterprises, Inc. v. Fulton County, Ga*, ___F. 3d___, 2001 W.L. 166375 (11th Cir. Feb. 20, 2001). In that case, the court reversed the grant of summary

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evidence of record is to be construed in the manner most favorable to the non-moving party. Compare *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970 and *Forsblad v. Jepson*, 292 Minn. 458 (1972). This fact is an obvious answer to Respondent's other argument, that a fact question is not raised by the conclusion of an expert witness whom the trial judge found not to be credible. Apart from the fact that Mr. McLaughlin did not merely render an opinion as to adverse secondary effects, he offered undisputed statistical evidence as to their absence, the fact is that credibility determinations are irrelevant upon motions for summary judgment.

2See *Kismet Investors v. County of Benton*, 617 N.W. 2d 85, 94 (Minn. App. 2000), Petitioner's Appendix at A.20.

judgment in favor of a defendant county upholding the validity of an ordinance prohibiting the sale of alcoholic beverages in an adult entertainment establishment. Prior to enacting the ordinance the County Board of Commissioners adopted a resolution stating it had reason to believe that consumption of alcoholic beverages in adult entertainment establishments would contribute to "increased crime and decreased property values," and directed the police department to conduct the study to verify the assumption. The resolution further stated that the Board intended "to enact, if warranted by said studies, a carefully tailored regulation to minimize the negative secondary effects" of such establishments. The police department responded to the directive by conducting a study comparing the number and types of police calls at 12 drinking establishments, six featuring adult entertainment and six did not. The study, conducted over a period in excess of two years, concluded that there was no statistical correlation between crime and adult entertainment establishments; but rather, the statistics indicated more police calls and greater frequency of crime at alcohol establishments which did not feature adult entertainment. Subsequently, the adult entertainment facilities themselves commissioned a study on the economic impact of the clubs on the surrounding neighborhood which study and indicated the effect of the clubs was "high occupancy and rental rates in existing buildings, expensive improvements, business expansion, turn-away business volumes and proposed development in the club's vicinities." The county itself retained its own appraiser, and while he criticized the

methodology used in the club's study, could not dispute its conclusion. The County Board of Commissioners enacted the restriction nonetheless. The Eleventh Circuit held that, under such circumstances, the county's regulation could not pass constructional muster stating:

> "Unlike in [*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)] and *Sammys [of Mobile, Ltd. v. City of Mobile*, 130 F. 3d 993 (11th Cir. 1998), cert. denied, 120 S. Ct. 1553 (2000)], where Plaintiffs never challenged the city's findings, the Fulton County clubs challenged and disproved the Board's findings, the evidence in the record relating to the conditions in Fulton County shows unequivocally that property values in the neighborhoods adjoining the Clubs have increased during the time the Clubs have been in existence, and that the surrounding buildings show no signs of blight, or lack of physical maintenance. Moreover, the Fulton County police study found greater reported crime connected establishments that served alcohol but did not feature adult entertainment. In other words, local studies commissioned both by the Clubs and the Board found no evidence of the secondary effects with which the Board was purportedly concerned. The question thus becomes, was it reasonable for Defendants to ignore relevant local studies and rely instead upon remote foreign studies in determining whether adverse secondary effects were attributable to the Fulton County clubs?
>
> We do not believe the Defendants had any reasonable justification for amending Sec. 18-76 when the County's own studies negated the very interests it purportedly sought to prevent. [Citation

> omitted.]...We recognize that a governmental entity is not required to perform empirical studies. [Citation omitted.] However, having done so, the Board cannot ignore the results. Local studies, including those commissioned by the county itself, revealed that the Clubs had less, up to half the incidence of crime than establishments that did not offer nude dancing, property values had increased in the Club's surrounding neighborhoods and the physical maintenance of the surrounding building no quantifiable blight. Accordingly, we find it was unreasonable for Defendants to rely on remote, foreign studies concerning secondary effects when the county's own, current empirical data conclusively demonstrated that such studies were not relevant to local conditions (footnoted omitted)."

Obviously, the identical fact situation exists in the instant case. The studies the county relied upon were all foreign and outdated, and, according to the uncontradicted affidavit submitted, plainly not relevant to the type of facility present in Benton County. Petitioner's Appendix at A.120-A.127. The decision of the Minnesota Court of Appeals to uphold a grant of summary judgment under such circumstances is plainly contrary to the recent decision of the 11th Circuit and should plainly be reviewed upon certiorari.

II. THE ORDINANCE WOULD HAVE THE EFFECT OF SUPPRESSING OR GREATLY LIMITING ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH.

In its original brief, Petitioner argued that the Benton County ordinance failed to allow adequate alternative avenues of communication, within the meaning of *Renton*, since all locations

were available only at the discretion of the County Planning Commission. This is a result of the county's parking ordinance, which grants to the County Board of Commissioners the absolute discretion to determine the number of off-street parking spaces required, on an individual business basis, in order for a business to open.

In response the county argues that many of the lots in question are so large that they can accommodate any reasonable number of parking spaces. What the argument ignores is that the ordinance gives to the Planning Commission the absolute discretion always to require one more parking space than any lot of any size would permit.

Secondly, the county argues that any arbitrariness in allotting such space would be subject to prompt judicial review. Even if true, the argument is irrelevant. Where permission to engage in protected First Amendment rights is concerned, the problem is not the abuse of discretion but the very existence of discretion. The test is not whether government will exercise the discretion in a censorial manner, but rather whether there is anything on the face of the ordinance preventing it from doing so. If there is not, the ordinance is constitutionally invalid. See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), and *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

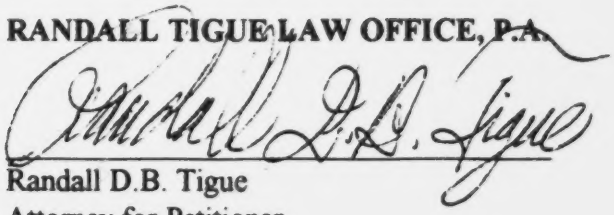
CONCLUSION

For all of the foregoing reasons, as well as those

advanced in the original petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

RANDALL TIGUE LAW OFFICE, P.A.



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Dated: March 25, 2001

REPLY APPENDIX

Transcript R.A.1

If it pays the bills, who cares what you do?"

MR. TIGUE: And I just have two brief comments. One is to Ms. Hoihjelle, you do not have to worry. Mr. Kellar has no intention of raping you or brining gangs. He does have an intention of suing you immediately for the lies you told this audience.

The final things are comments of the United States Supreme Court on the case of Planned Parenthood. Southeastern Pennsylvania versus Casey's (phonetic). He said – The United States Supreme Court says "Our obligation is to define the liberty of all, not to mandate our own moral code." That's the obligation of this body as well. Okay. Thank you.

MR. BINNIE: I think the Board has some questions.

MR. BUKOWSKI: I have two questions of Mr. Kellar. One is: Were you associated with the King's Inn before you purchased it?

MR. KELLAR: No.

MR. BUKOWSKI: And did you know that the nonconforming ordinance expired on the 31st when you purchased that place?

MR. KELLAR: No, sir, I did not.

Supreme Court, U.S.
FILED
MAY 20 2002
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(4)

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INTRODUCTION

This supplemental brief is submitted pursuant to Supreme Court Rule 15.8, on the basis of a new case, recently decided, not available at the time of Petitioner's last filing.

ARGUMENT

On May 13. 2002, this Court decided *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.____(May 13, 2002). Although the decision in that case ultimately favored the City of Los Angeles, over the adults-only video store/arcade challenging the ordinance in question, it is clear from the plurality, concurring, and dissenting opinions that the proper disposition of the above-entitled matter would be to grant the writ of certiorari, vacate the judgment below, and remand the matter for reconsideration in light of *Alameda Books*.

Of key importance is the following language from the plurality opinion of Justice O'Connor concerning the evidentiary burden upon municipalities to justify adult entertainment zoning ordinances under a "secondary effects" theory:

> "In *Renton*,...[w]e held that municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest [Citations omitted.] This is not to say that a municipality can get away with

> shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." [Citation omitted.] Slip opinion at pp. 10-11.

[1]Under this analysis, it was clearly inappropriate for the District Court to have granted summary judgment against

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1To be sure, this standard clearly represents only the stated of four justices, to-wit: Justices O'Connor, Chief Justice Rehnquist, Justice Scalia and Justice Thomas. However, it is clear that the four dissenting Justices, Souter, Stevens, Ginsburg, and Breyer, would require a far more stringent evidentiary showing on the part of government. See for example, slip opinion at pp. 6-7, Souter J. dissenting. Consequently, it is clear that the foregoing quotation from the plurality opinion represents the bare minimum which a majority of the United States Supreme Court would require in order to justify an adult entertainment regulation premised on a secondary effects theory. It is clearly the standard which now governs the instant case.

Petitioner with respect to the constitutionality of the ordinance in this case.

To begin with, it is absolutely clear that the ordinance itself is premised on "shoddy data or reasoning," within the meaning of the plurality opinion in *Alameda Books*.[2]

More significantly, Petitioners in the instant case clearly cast doubt on the county's rationale not only by disputing the validity of the studies the city relied upon, but by furnishing essentially uncontradicted evidence contrary to the county's rationale. In particular, Petitioner tendered the affidavit of Richard Wilson, Appendix at A.120-A.127, asserting that virtually all of the studies relied upon by the county finding that nude dancing caused adverse secondary effects dated back to the 1970's and early 1980's, during which time nude dance establishments consisted of sleazy topless bars, poorly

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2The total unreliability of the studies relied upon by Benton County in enacting its ordinances were set forth at length in the amicus curiae briefs of the First Amendment Lawyers Association, both in *Alameda Books* and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). The deficiencies of this studies is set forth in a published source in Paul, Linz & Shafer, Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm.L & P. 355 (2001)

maintained and operated, at which people would not wish to be seen. The affidavit pointed out that over the past 15 years, the industry has dramatically changed and that the sleazy strip club has been replaced by upscale adult cabarets, featuring hospitality and customer safety, characterized by expensive buildings, substantial investments in high technology equipment such as lighting, sound, and security. The affidavit points out that far from causing property values to decline and crimes to increase, upscale adult cabarets generally enhance property values and contribute to public safety. The affidavit further points out that, based upon personal observation of Petitioner's establishment, it is far more like the upscale adult cabaret than the sleazy strip bar.

This opinion evidence was amply supported by evidence tendered in a report by Consultant R. Bruce McLaughlin, indicating that in its five years of existence, property values surrounding Petitioner's establishment increased at double the rate of unincorporated Bentor County as a whole and more than four times as fast as the comparable control use located on the same highway, but not featuring adult entertainment (Appendix at A.232-A.242). With respect to crime, the McLaughlin report pointed out, again without contradiction, that in its years of existence, Petitioner's establishment

generated, on the basis of area and seating capacity, fewer police calls than a nearby alcohol establishment not featuring adult entertainment and absolutely fewer police calls than a local gas station and convenience store. Absolutely no sex crimes or drug crimes occurred at Petitioner's establishment in five years (Id. at A.225-A.231).

Plainly, under the standard for analysis adopted by the plurality in *Alameda Books*, , the adult entertainment zoning regulation could not have been sustained in light of this evidentiary showing, without the county affirmatively presenting evidence to justify its original rationale, something the county plainly never did.

Obviously, had the Minnesota courts had the benefit of this Court's evidentiary requirements announced in *Alameda Books*, the case would have been differently decided.

Consequently, the appropriate resolution of this case is to grant certiorari, vacate the judgment below and remand the matter for reconsideration in light of *Alameda Books*.

CONCLUSION

For all of the foregoing reasons, the relief sought in the

petition for writ of certiorari should be granted.

Respectfully submitted,

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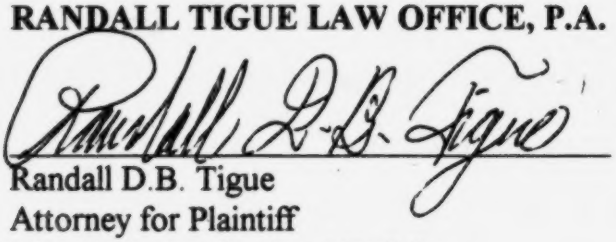

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(5)

No. 00-1305

In the
Supreme Court of the United States

KISMET INVESTORS, INC., A MINNESOTA CORPORATION,

Petitioner,

vs.

THE COUNTY OF BENTON, MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This supplemental responsive brief is submitted pursuant to Supreme Court Rule 15.8 because a new case, not available at the time of Respondent's last filing, has been recently decided.

ARGUMENT

This Court recently filed a decision in City of Los Angeles v. Alameda Books, Inc., 535 U.S. __ (May 13, 2002). Petitioner, after years of litigation, now contends that it would be proper for the Court to grant certiorari, vacate the judgment below and remand the matter for reconsideration in light of Alameda Books. This argument fails for two reasons: 1) the argument is not properly before this court; and 2) Petitioner's Supplemental Brief advances no rationale that casts doubt on the county's reliance on numerous studies.

I. THE ISSUE PETITIONER TRIES TO RAISE IS NOT PROPERLY BEFORE THIS COURT.

The issues presented in the initial Petition for Writ of Certiorai do not question the numerous specific

studies that the county relied on, the issue raised by Alameda Books. Instead the issues raised in the petition focus on data related to this one adult use, the King's Inn. A careful review of the issues contained in the petition shows that the issue of the adequacy of the studies was not raised. Petitioner's first issue is stated as follows:

> I. A SUBSTANTIAL CONSTITUTIONAL QUESTION EXISTS AS TO WHETHER THE MINNESOTA COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON THE ISSUE OF WHETHER ITS ZONING ORDINANCE WAS "NARROWLY TAILORED" TO THOSE USES FOUND TO CAUSE ADVERSE SECONDARY EFFECTS, IN LIGHT OF SUBSTANTIAL AND LARGELY UNCONTRADICTED EVIDENCE THAT NO SUCH EFFECTS WERE CAUSED BY PETITIONER'S USE.

Pet. 11 (emphasis added). This issue does not assert that the methodology of the studies relied upon by the county was in any way deficient, but simply states that "no such effects were caused by Petitioner's use." The first issue of the petition does not raise the issue that

Petitioner now wishes to address, the adequacy of the studies.

The second issue raised in the petition is:

> II. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER THE ORDINANCE, IF IMPLEMENTED, WOULD HAVE THE EFFECT OF AMELIORATING ADVERSE SECONDARY EFFECTS.

Pet. 24. This second issue does not address the data or reasoning contained in the underlying studies, but instead addresses whether the amortization would result in a worsening of secondary effects. Id. at 25-26. This issue is unrelated to whether the county had a sufficient basis for passing its ordinance based upon the studies that were before it.

The third issue also has nothing to do with the issue that Petitioner contends now justifies the issuance of a writ. The third issue is whether sufficient alternative avenues of communication remained in the face of "off-street parking requirements." Id. at 28. Again, the third

issue is not the one that Petitioner now asks this Court to address.

It is fundamental that a party must include issues for review in its Petition for Writ of Certiorari. Yee v. Escondido, 503 U.S. 519, 537 (1992). A question that is merely "complementary" or "related" to the question presented in the petition is not "fairly included" therein. Id.; Izumi Seimitsu Kogyokabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 32 (1993).

Because Petitioner did not fairly raise the issue of the adequacy of the studies in its Petition for Writ of Certiorari, the Court should deny the Writ of Certiorari and end this lengthy and tortuous litigation.

II. PETITIONER HAS NOT "CAST DIRECT DOUBT" ON THE COUNTY'S RELIANCE ON THE NUMEROUS STUDIES IT CONSIDERED.

In its supplemental brief, Petitioner contends that the affidavits of an adult business lawyer and an adult business expert witness demonstrate the county's reliance upon "shoddy data or reasoning" so as to warrant further proceedings below. Alameda

Books, slip op at 11. But Petitioner never "succeed[ed] in casting doubt on the municipality's rationale." Id. Instead, the evidence that Petitioner relies on is itself so slipshod and poorly reasoned that it is insufficient to bring into question the county's reliance on the numerous studies it reviewed.

This is a case where the trial court had before it not a single study, but many, including several that were created near the time of the adoption of the county ordinance. The county relied on studies from the following communities: St. Paul, Minnesota; the Office of the Minnesota Attorney General; Indianapolis, Indiana; Rochester, Minnesota; Los Angeles, California; Phoenix, Arizona; Adams County, Colorado; Amarillo, Texas; and Austin, Texas. Pet. App. 55, 57-58. Here, in contrast to Alameda Books, the trial court specifically found that the county relied on at least nine separate studies showing the adverse secondary effects caused by adult businesses. Id.

To rebut these studies, the first piece of evidence Petitioner's Supplemental Brief points to is the Affidavit of Richard Wilson, a lawyer and adult business owner. Pet Supp. Brief 3; Pet. App. 120-27. Nowhere in his affidavit does Wilson even attempt to directly analyze or contradict the particular studies the county relied upon. Instead, the substance of his criticism of the studies is that "virtually all of those studies were done in the late 1970's or late 1980's, and involved studies of adult entertainment facilities that were in the nature of sleazy topless bars, most of which have gone out of existence today." Id. at 124-25. Wilson's failure to address the specifics of the studies or even identify which specific studies he is talking about is fatal to the contention that his affidavit succeeds in casting doubt on the county's rationale.

The other evidence that Petitioner points to in its supplemental brief also fails to bring into doubt the merits of the studies the county board had before it. The gist of this second argument is that the adult use

facility at issue here had a low demand for police services and that property values in the area actually increased. Pet. Supp. Brief 4-5. Preliminarily, it should be noted that the trial court specifically held that this particular witness, Bruce McLaughlin, whose demeanor the court had the opportunity to observe at trial, was not a credible witness. Finding of Fact No. 17, Pet. App. 34. More importantly, with respect to the property value analysis, McLaughlin compared countywide property values with a sample area that he created around the King's Inn. Since the King's Inn is located on a lake, much of the sample area used by McLaughlin was lakefront property. McLaughlin specifically notes he extended his sample area to include properties on the other side of the lake. Pet. App. 233. Comparing lakefront property values with countywide property values is facially suspect. This superficial and shoddy analysis of property values related to only one adult business does not "cast direct

doubt" on the county's rationale. Alameda Books, slip op. at 11.

McLaughlin's analysis regarding police services was equally suspect. McLaughlin concedes that the King's Inn had over 50% more police calls than a nearby bar, but then attempts to rationalize these calls based on the square footage of the building. Of all of the properties referred to in McLaughlin's analysis, the King's Inn had the most calls for police service. A-225-31. Also, despite Petitioner's contention that McLaughlin used five years of data, Pet. Supp. Brief 5, he states in his affidavit that he used only one. Pet. App. 225.

From a broader perspective, these details of police calls and property values with respect to this one establishment should logically have no affect on the outcome of this proceeding. Municipalities must pass zoning ordinances that apply to broad categories of adult use establishments. The permissible zoning criteria cannot hinge upon the vague and intangible

"sleazy" vs. "non-sleazy" analysis that is being advanced by the Petitioner. Neither can it make a difference that this particular business behaved better than other adult use establishments or was even the best-behaved adult use establishment following the years that Benton County enacted its ordinance.

One inevitable consequence of accepting Petitioner's argument is that the litigious adult use industry and municipalities would end up participating in depositions of individuals who call police. The courts would presumably wade through these individual calls to the local police department to determine which ones legitimately relate to the nature of the business and then use some formula to determine whether or not the business had somehow passed from the "non-sleazy" to the "sleazy" category of adult business based on the last year's statistics. Such an inquiry would be wasteful, and is not one required by any existing principle of constitutional law.

In Alameda Books the Court was faced with a trial court record that was not well-developed. Id., slip op. at 11. Here, by contrast, the record is well-developed. The trial court carefully reviewed the proceedings of the county and found that it reasonably relied upon almost a dozen studies. The petition should be denied.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

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